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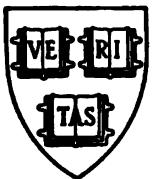
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AN ESSAY
ON
USES AND TRUSTS,

AND ON

The Nature and Operation

OF

CONVEYANCES AT COMMON LAW,

AND OF THOSE WHICH DERIVE THEIR EFFECT FROM THE STATUTE
OF USES.

BY

FRANCIS WILLIAMS SANDERS, ESQ.,

The Second American Edition,
FROM THE LAST LONDON EDITION,

BY GEORGE WILLIAMS SANDERS, ESQ.,
OF LINCOLN'S INN, BARRISTER;

AND

JOHN WARNER, ESQ.,
OF THE INNER TEMPLE, BARRISTER.

WITH REFERENCES TO LATER ENGLISH AND AMERICAN CASES, BY A
MEMBER OF THE PHILADELPHIA BAR.

o

IN TWO VOLUMES.

VOL. I.

PHILADELPHIA:
ROBERT H. SMALL, LAW BOOKSELLER.

1855.

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THE new matter in the present Edition (with the exception of the alterations in the precedents at the end of the second volume) is comprised in the additions to the notes. These additions are inserted between brackets, and contain, it is believed, a reference to all the more modern cases and statutes which it is material to notice. It is proper to state also that the arrangement of the original notes has been in part altered, those collected at the end of the second volume in the former editions having been removed to the bottom of the page, as being the more convenient position for reference.

The reasons which have been considered sufficient in the republication of various legal works, to authorize an interference with the text do not exist in the present case, notwithstanding the time which has elapsed since the publication of the last edition ; this being an essay confined to one particular subject, in which no great revolution has been effected (though at one time threatened, by a repeal of the Statute of Uses,) since the Author's time; and partaking, moreover, of the nature of a history, in which the progress of Uses and Trusts is traced from their earliest introduction. Indeed it has been an object in preparing the present edition for the press,—from a belief that in some respects the value of a work like the present may be diminished, instead of enhanced, by a material addition to the bulk of it—to keep the book as far as possible within its original limits. In one instance, the legitimate dimensions of an editorial note may appear to have been exceeded; but for this the nature of the subject, the numerous legislative provisions for which it has called since the Author's time, and the various

decisions upon them, will perhaps be considered to form a sufficient apology. But though the work is partly historical, yet the value of it as a practical treatise, containing an able exposition of the law upon the subject to which it relates, has been universally acknowledged by the profession; and with the view, on the present occasion, of rendering the book as complete as possible for the purpose of reference, besides the addition of the recent cases and statutes, a more copious index has been substituted for that in the former editions. The precedents also, where necessary, have been either remodelled or entirely replaced by others adapted to the present law and system of conveyancing; and it is hoped that the humble endeavour, by these means, to render the present edition no less useful and acceptable to the practitioner than to the student, will not have proved entirely unsuccessful.

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ESSAY

USES AND TRUSTS.

*CHAPTER I. [*1]

OF USES AND TRUSTS BEFORE THE STATUTE 27 HEN.
8, c. 10.

I. PREVIOUSLY to the statute 27 Hen. 8, c. 10, (usually called the Statute of Uses,) the use was an equitable, or beneficial interest, distinct from the legal property in the land. Upon principles established in the courts of equity, the use itself was alienable by the *cestui que use*, and the statute of 1 Rich. 3 enabled him to convey the possession, without the concurrence of his trustee: and, ultimately, the statute 27 Hen. 8, c. 10, converted the equitable, or beneficial interest of the *cestui que use*, into a legal estate. I shall endeavour in this chapter to trace the origin, progress, and learning of the use in its fiduciary state.

The statute 1 Rich. 3 having described the fiduciary interest, which it was meant to affect, by the single word, *use*, it became necessary to *ascertain, with [*2] precision, the meaning of the word. An equitable interest, not a use within the statute, may with propriety be called a trust.

It will be therefore proper to define the use; and,
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with reference to the statute of 1 Rich. 3, it is important to ascertain the distinction between uses and trusts.

The use was said to be, “a trust or confidence, which is not issuing out of land, but as a thing collateral, annexed in privity to the estate, and to the person, touching the land; scil. that *cestui que use* shall take the profits, and that the terrentenant shall make estates according to his direction.”¹

The use consisted² of three parts: that the feoffee would suffer the feoffor to take the profits; that the feoffee, upon request of the feoffor, or notice of his will, would execute the estates³ to the feoffor, or his heirs, or any other by his direction; that if the feoffee had been disseised, and so the feoffor disturbed, the feoffee would re-enter, or bring an action to recontinue the possession.⁴

II. Sir Francis Bacon says,⁵ “Where the trust is not special, nor transitory, but general and permanent, there it is a *use*.⁶ A feoffment was made in fee, by which the possession, or seisin,⁷ was transferred to the feoffee; [*_3] and a confidence, or trust, was placed in him to permit the feoffor, or any other person, and his heirs, to receive the rents and profits; and also to make such legal estates as he or they should direct. This confidence was the use; for the feoffee had a permanent estate in fee in the lands, subject to the use, or distribution of the profits. The fiduciary or beneficial interest was commensurate to the legal estate. But a trust did not make this regular division of property into use and possession; it signified, that the grantor had executed a conveyance of the lands, by which he had not only transferred the possession, but also the use, or right to take the profits; reposing a personal trust in the grantee, that he would retain both, in order to answer some special purpose. Thus, if he made a conveyance in trust, or to the intent, that the grantee should convey to a third person, the trust placed in the grantee was not to pay over the profits, but to dispose of the profits and the possession.”

¹ 1 Co. 121, a. Co. Litt. 272, b.

² Bacon, *Uses*, 10.

³ See Year Book, 2 Edw. 4, 2, b.

⁴ See Bacon, *Uses*, 9.

⁵ In the following license to alien is the form of an ancient grant of the

So if a man had enfeoffed another to the *intent, or in trust, to be re-enfeoffed; or to the intent, to be vouched;⁶ or to the intent to suffer a recovery;⁷ none of these intents, or trusts, were uses.

The trust above described is called by Sir Francis Bacon, "the special trust lawful."⁸ But there is a special trust unlawful, which, he says, was created to the intent "to defraud creditors, or to get men to maintain suits, or to defeat the tenancy to the præcipe, or the Statute of Mortmain, or the lords of their wardships, or the like; and those are termed frauds, covins, or collusions."

*In another place he adds,⁹ (speaking of the special trust lawful,) "And this we call confidence, [*5] and the Books do call them intents; and therefore these three are to be distinguished, and not confounded; the covin, confidence, and use."

Upon the introduction of uses, the Court of Chancery assumed an exclusive jurisdiction over them; and during the exercise of that jurisdiction previously to the Statute of Uses, its decisions were not free from the scruples of the common law: and from considerations arising from the laws and principles of tenure, and from the nature kind. From the style of this king, I suppose it was in the reign of Henry the Sixth.

"Henry by the grace of God king of England, France, and lord of Ireland. To all to whom these present letters shall come, greeting. Know ye, that of our own special grace, and in consideration of twenty marcs paid to us in our Hanaper Office, we have granted, and have given license for ourselves and our heirs, as much as in us lay, to our dearly beloved Richard Cornewayle, Esq., that he may enfeoff Thomas Whitten, Esq., Wm. Bourne, Esq., Jno. Hudenett, Esq., Thos. Bullesdon, Clerk, of his castle and village of Stepulton in the Marches of Wales, adjacent to the county of Salop, together with the appurtenances thereof, which are held of us in capite. To have and to hold to the same Thomas, William, John, and Thomas, and their heirs, of us or our heirs, by due and customary service, in order that they may be enabled to give and grant in full and peaceable seisin the aforesaid castle and village, with the appurtenances, to the said Richard and Cecilia his wife, and the heirs of the bodies of the said Richard and Cecilia; and if the aforesaid Richard and Cecilia depart this life without any heir of their two bodies, the aforesaid castle and village, with the appurtenances, shall remain to the right heirs of the same Richard, to be held of us and our heirs by the aforesaid service. And we give by these presents license to the same Thomas, William, John, and Thomas, that they may receive him the aforesaid Richard, and hold the aforesaid castle and village to themselves and to their heirs, to hold as aforesaid. In witness whereof we hereby cause these letters to be made patent. Witness myself at Gloucester, the 24th Nov., in the ninth year of our reign.

(Signed)

"MAPLETON."

⁶ Bacon, Uses, 8.

⁷ 2 Salk. 676. See Shep. Touch. 652.

⁸ Bacon, Uses, 8.

⁹ Page 9.

of the limited and inferior estates of tenants in tail, for life, and for years, it was determined, that neither tenant in tail, for life, nor for years, could stand seised to a use. The trust, therefore, declared upon the estate, or seisin of a tenant, having a limited interest, was not, strictly speaking, a use.¹

It must follow, that if the Court of Chancery did not acknowledge the beneficial interest of the *cestui que trust*, he was without remedy; and consequently that, in those cases where the trust was declared upon the seisin or estate of a person not capable, according to the then contracted rules of equity, to stand seised to a use, the *subpoena* did not lie against the trustee to compel him to perform the trust.

[*6] *It is probable that the distinction which has been taken between uses and trusts may, to some, appear controvertible. But the opposers of it must contend that the special trust before described, and the trust declared upon the seisin of a tenant in tail, or for life, and upon the possession of a tenant for years, was within the statute 1 Rich. 3, c. 1; and consequently, that the *cestui que trust* might have conveyed the legal estate without the concurrence of the trustees, in whom it was vested: a construction which, so far as it concerns the special trust, and the trust declared upon the possession of a tenant for years, would lead to practical consequences of considerable importance, but which I shall attempt to show, in a subsequent part of this essay, is not tenable.

III. It is impossible to fix the precise period when the use or trust was introduced into England: but conjecture has not been idle in attempting to supply the want of positive information. I do not mean to inquire as to the origin of those personal trusts, which are better known in our law by the name of deposits, or bailments; for imagination can scarcely trace a period so remote, in which man, in society, was not sometimes induced to intrust another with the object of his care, or the fruits of his industry.

A special trust seems to have been the root from

¹ *Vide post, sec. vi. (2).*

which the permanent use arose ; or, as Lord *Bacon observes,² “A trust was the way to a use :” and in another place, “The special intent unlawful and covinous, was the original of uses, though after, it induced to the lawful intent, general and special.” The progress, indeed, from the trust created for a special or transitory purpose, to the general or permanent use, seems to be so natural, that the proof of it does not require the aid of authority.³

Mr. Selden has stated,⁴ that “Ethelred, Ealdorman of *Mercland*, had all that, which was the kingdom of Mercia, to his own use, as an ealdorman, and fief, giving him in marriage with Ethelfled by her father, King Alfred. *Londoniam caput regni Merciorum (saith William of Malmesbury) cuidam primario Ethelredo, in fidelitatem suam cum filia Ethelfleda concessit.*” He adds, *[speaking also from William of Malmesbury,] [*8] “that after Alfred’s death, his son Edward was king of Westsex and Mercia, but so, that he was king of Mercia in name only; the whole possessions remaining to Earldorman Ethelred. *Duo regna Merciorum et West Saxonum conjunxerat; Merciorum nomine tenus, quippe commendatum Duci Ethelredo, tenens.*”

According to Sir Martin Wright,⁵ the word *commendatum* suggests a *trust*: and, indeed, considering this gift by Alfred according to the modern construction of a conveyance, it would appear to be an assurance, not operating upon the legal, but merely upon the beneficial interest; for Alfred gave the kingdom of Mercia to Ethelred, as the marriage-portion of his daughter, and

² Bacon, *Uses*, 9.

³ Yet the point seems to have been discussed in Lord Dacre’s case, 27 Hen. 8, 7, b. (*Year Book*). The question was, whether a use was devisable? It was contended, that the use being a novelty in the law, it could not be devised, because a devise, at that time, must have been supported by a *custom*. It was answered by York, that a use was merely a trust, which was at common law; for confidence was necessary between man and man; and that this trust was always saleable or grantable at pleasure, by assurances not applicable to the transfer of the land itself. York’s argument appears to be erroneous; for admitting that a trust in the general sense of the word was coeval with the law, yet it is evident, that the permanent division of property into the legal, and beneficial interest, distinct from each other, was an invention to evade or lessen the force of some pre-existing law.

⁴ Tit. Hon. 615, ed. 1631.

⁵ *Tenures*, 47, Note C.

yet the legal estate appears to have continued in Edward the son and heir of Alfred.

But it is evident that Mr. Selden considered the case as amounting to a Saxon tenure, and not to a trust; and there is no ground for supposing that Alfred voluntarily converted himself into a trustee, when he might have effected the same purpose by a simple gift, modified in any manner suitable to his wishes, and without assuming an office incompatible with his situation as sovereign.⁶

[*9] *It has been argued, with much propriety; that uses could not have existed before the statute *quia emptores terrarum*, 18 Edw. 1, which abolishes the immediate tenure between the feoffor and feoffee. "In ancient books no mention is made of a use; and if any use had been at the common law, it would have been specified in the ancient books of our law: and thus it seems to me, that before the statute of *quia emptores terrarum*, if one had made a feoffment in fee, the law would have created a tenure between the feoffor and the feoffee; which tenure is a *consideration*; and by such consideration the feoffee would have been seised to *his own use*: and so, before that statute, there was no use by reason of the consideration before mentioned."⁷

It has been supposed that trusts were known in the reign of Henry the Third. This opinion⁸ is occasioned [*10] by the statute of Marlbridge,⁹ which *relieves against false and covinous feoffments, made to

⁶ Mr. Sharon Turner, in the 2d vol. of his History of the Anglo-Saxons (173), states a similar grant. "The king gives a manor to Edred, and permits Edred to give it to Lulla and Sigethrythe, who are enjoined to give part of the land to Eaulfe and Herewine; but Eaulfe was to give half of this part to Biarnuive, and to enjoy the other half for his own life, with the power of devising it, as he pleased."

⁷ Per Pollard, 27 Hen. 8, 9, a. Year Book. But see Bro. N. C. 60, and March's N. C. 128, where it is said, *et opinio fuit*, that a use was at common law before the statute of *quia emptores terrarum*; but uses were not common before the same statute. And see note to pl. 2, 22 Vin. 179.

⁸ See Bro. N. C. P. 59, 60.

⁹ 52 Hen. 3, c. 6. "As touching them that use to enfeoff their eldest sons and heirs being within age, of their heritage, for to defraud the lords of the fee of their wardships, it is provided, accorded, and agreed, that by occasion of any such feoffment no chief lord shall lose his ward. (2.) Moreover, touching them that fain false feoffments of their lands, which they will lease for term of years to defraud the chief lords of their wards, wherein it is contained that they are satisfied of the whole service due unto them until a certain term, so that such

defraud the chief lords of their wards. The statute, however, does not, I apprehend, warrant this conclusion. For as to the opinion, that the feoffor, in the case of a feoffment to his eldest son, or heir, within age, took the profits for his own use, it is, as Sir Francis Bacon observes, a conceit; for although the profits were taken to the use of the son, it was still a feoffment within the statute:¹ and as to the second case mentioned by the statute, that certainly alludes to feoffments upon condition, and not upon trust.² There is ground to conclude, that neither uses nor trusts were known at that time, from the circumstances attending the succeeding king's reign (Edward the First): for the clergy, who were then endeavouring, *arte vel ingenio*, to bring lands into mortmain without license, were not, it seems, acquainted with the utility of trusts. The statute *De Religiosis*,³ which was principally made to *prevent alienations in mortmain, takes no notice of them; and if uses or trusts had been then known, it is most probable that the clergy, who were more conversant in the civil law than the laity, would have taken advantage of them.

It has been argued that trusts were early received, on account of the writ called *causa matrimonii prælocuti*.⁴ Thus, if a woman had given lands in fee, or for life, to a man, to the intent that he should marry her, the common law gave her this writ of *causa matrimonii prælocuti*, to recover her lands, in case the marriage did not take effect.⁵ So if the woman had given the lands to a stranger, to the intent that he should reconvey them to her and her intended husband, the same writ was allowed her.⁶ This writ, it must be observed, was granted to the woman by the common law, which is alone a conclusive reason, that the confidence reposed in the hus-

feoffees are bound at the said term to pay a certain sum to the value of the same lands, or far above; so that after such term, the land shall return unto them, or to their heirs, because no man will be content to hold it upon the price; it is provided and agreed that by such fraud no chief lord shall lose his ward."

¹ Bac. Uses, 25.

² See 2 Inst. 111. Poph. 77.

³ 7 Edw. 1. See Bac. 25. Poph. 77.

⁴ Vide Year Book, 27 Hen. 8, c. 10.

⁵ F. N. B. 471.

⁶ F. N. B. 472.

band, or stranger, was not a use nor trust; for it is a rule, that, whenever a remedy is given against uses or trusts, that remedy is afforded by an *express statute*, and not by the *common law*.⁷ It has been further said,⁸ that trusts were introduced in the reign of Edward the Second; but I have found no instance of a trust which can support that opinion.⁹

[*12] *Trusts, however, were certainly frequent during the reign of Edward the Third. *Brooke*, in a note upon a case reported in the Year Book of that monarch's reign¹ (where feoffees were sued by petition), thinks it worthy of observation, that trusts were known in those days.² And although Sir Francis Bacon says,³ that this case, and the book of 8 Ass. (where a fine was levied *in autre droit*), are but implications of no moment; yet the statute 50 Edw. 3, c. 6, clearly proves that *special trusts* were then in practice. The statute runs thus: "Because that divers people inherit of divers tenements, borrowing divers goods in money, or in merchandise, of divers people of this realm, do give their tenements and chattels to their friends by *collusion* thereof to have the profits at their will, and after do flee [*13] to the franchise of *Westminster, of St. Martin-le-Grand, of London, or other such privileged places, and there do live a great time with an high countenance of another man's goods and profits of the said tenements and chattels, till the said creditors shall be bound to take a small parcel of their debt, and release the remnant. It is ordained and assented, that if

⁷ Poph. 77. Bac. Uses, 23.

⁸ Brent's Case, 2 Leon. ca. 25, per Harpur.

⁹ I observe, however, that Mr. Daines Barrington, in his Observations upon the Statutes, 308, note *a* (ed. 1767), says there is an Irish statute against secret feoffments, so early as the third of Edward the Second, styled the Statutes of Kilkenny. [The following appears to be the statute alluded to by Mr. Barrington: "An Act against Fraudulent Conveyances." "It is agreed and assented, that if any man enfeoffs another of his land, with intent to enter into rebellion, or to commit any other felony, and after the felony committed, to have again his said land; that such manner of feoffments shall be held for none, but that presently after the felony committed, the king shall have the year and the waste of the same tenements; and after the chief lord shall have the same as his escheat, so that the truth of the matter, and the manner of the feoffment be first inquired by writ out of the Chancery." 3 Edw. 2, c. 4, in the Parliament of Kilkenny. Stat. Ireld. 1 vol. 2, ed. 1765. Dublin.]

¹ 44 Edw., 3, 25.

² Bac. Uses, 23, 24.

³ Bro. Feof. al. Uses, 9.

it be found that such gifts be so made by collusion, that the said creditors shall have execution of the said tenements and chattels, as if no such gifts had been made.”⁴

*IV. The earliest mention which I find of the [*14] word *use*, is in the statute of provisors, 7 Rich. 2, c. 12;⁵ and Bacon considers the first practice of uses to be about that reign.⁶ It is likely, however, that uses of the permanent kind before described were known in the preceding king’s reign;⁷ for as in their commencement uses were of a secret nature (the use being originally created on the estate of the feoffee merely by a *parol* declaration); it is probable, that they were not noticed by the legislature, until they had gained some degree of notoriety. In a case before cited,⁸ Manwood says, “I have seen divers ancient deeds of uses, and in ancient times you shall not find that any would purchase lands

⁴ By a subsequent statute, 1 Rich. 2, c. 9, “Because it is complained to the king that many people of the said realm, as well great as small, bearing right and true title, as well to lands, tenements, and rents, as in other personal actions, be wrongfully delayed of their right and actions, by means that the occupiers or defendants to be maintained and sustained in their wrong, do commonly make gifts and feoffments of their lands and tenements which be in debate, and of their other goods and chattels to lords and other great men of the realm, against whom the said pursuants for great menace that is made to them cannot, nor dare not, make their pursuits: and also on the other part complaint is made to the king, that oftentimes many people do disseise other of their tenements, and anon, after the disseisin done, they make divers alienations and feoffments, sometimes to lords and great men of the realm to have maintenance, and sometime to many persons of whose names the disseisees can have no knowledge, to the intent to defer and delay by such frauds the said disseisees and the other demandants and their heirs, of their recovery, to the great hindrance and oppression of the people; it is ordained and established, that from henceforth no gift or feoffment of lands, tenements, or goods, be made by such fraud or maintenance; and if any be in such wise made, they shall be holden for none and no value; and the said disseisees shall from henceforth have their recovery against the first disseisors, as well of the lands and tenements, as of their double damages, without having regard to such alienations, so that the disseisees commence their suits within the year next after the disseisin done. And it is ordained and established, that the same statute shall hold place in every other action in plea of land where such feoffments be made by fraud or collusion, to have their recovery against the first such feoffor. And it is to wit, that this statute ought to be understood where such feoffs thereof take the profits.”

⁵ “And moreover it is assented, that if any alien have purchased, or from henceforth shall purchase, any benefice of holy church, dignity, or other thing, and in his proper person take possession of the same, or occupy it himself within the realm, whether it be to his own proper use, or to the use of another, without especial license of the king, he shall be comprised within the same statute.”

* Bac. 24.

⁶ [Such uses seem to be referred to in the above-cited stat. of the 1st year of the reign of Rich. 2, (c. 9,) though the word *use* is not mentioned. See the concluding paragraph of that stat.]

* Brent’s Case, 2 Leon. 15.

to himself alone, but had two or three joint feoffees with him, and he who was first named in the charter of feoff-[*15] *ment, was *cestui que use*, although that no use was declared to him upon the livery; and so it was known by the *occupation* of the lands. And the reason why no mention is made in our ancient books of uses, is, because men were then of better consciences than now they are; so as the feoffees did not give occasion to their feoffors to bring *subpoenas* to compel them to perform the trusts reposed in them."

In consequence of the secret manner in which uses were at first declared, and of the difficulty of obtaining evidence of the object of the parties, and the extent of the beneficial interest, by the ordinary proceedings of a court of law, it has been said, that John Waltham, who was Bishop of Salisbury, and Chancellor to King Richard the Second, by a strained interpretation of the statute of West. 2, devised the writ of *subpoena*, returnable in the Court of Chancery only.¹

V. The use afforded the clergy an opportunity of avoiding the statutes of Mortmain; for although they could not buy lands in their own names, yet they might evade the statutes by obtaining grants, not directly to, but to the *use* of their religious houses. But the legislature interfered, and by a statute made 15 Rich. 2, c. 5,²

¹ 3 Black. Com. 52. See Mr. Cruise's valuable Digest, 1 vol. 396, et seq., and Gilb. Forum Romanum, 17.

² "And moreover it is agreed and assented, that all they that be possessed by feoffment, or by other manner, to the use of religious people, or other spiritual persons, of lands and tenements, fees, advowsons, or any other possessions whatsoever, to amortize them, and whereof the said religious and spiritual persons take the profits, that betwixt this and the Feast of St. Michael next coming, they shall cause them to be amortized by the license of the King and of the Lords, or else that they shall sell and alien them to some other use between this and the said Feast, upon pain to be forfeited to the King, and to the Lords, according to the form of the statute of religious, as lands purchased by religious people; and that from henceforth no such purchase be made, so that such religious or other spiritual persons take therefore the profits as afore is said, upon pain aforesaid, and that the same statute extend and be observed of all lands, tenements, fees, advowsons, and other possessions, purchased, or to be purchased, to the use of guilds or fraternities. And moreover it is assented, because mayors, bailiffs, and commons of cities, boroughs, and other towns, which have a perpetual commonalty, and others which have offices perpetual, be as perpetual as people of religion, that from henceforth they shall not purchase to them and to their commons, or office, upon pain contained in the said statute De Religiosis. And whereas others be possessed, or hereafter shall purchase to their use, and they thereof take the profits, it shall be done in like manner as is aforesaid of people of religion."

it was enacted, that *the lands so purchased to [*16] uses should be amortized by license from the crown, or sold to private persons ; and that uses should be subject for the future to the statutes of mortmain, and be forfeitable like the lands.

The disputes between the Houses of York and Lancaster originated in the reign of Richard the Second. It was natural, that men, becoming parties to these unfortunate quarrels, should seek the means of retaining their estates in their own families by preserving them from forfeiture. This was *effected by the aid of [*17] uses. The most plain and simple plan was that of conveying lands, in the lifetime of the grantor, to such uses as were directed in the deed, or by parol declaration. By another, a power was given over the use which was not suffered by the common law over the land ; that of devising. As the legal estate was vested in the feoffees by either of these dispositions, the lands were exempted from forfeiture. The causes then, which induced men to continue uses at this period, were extremely different from those of their production. Their origin was occasioned by fraud ; their continuance proceeded from laudable motives.

During the civil commotions, which attended the troublesome reigns of Richard the Second, and Henry the Fourth, most of the lands in the kingdom were conveyed to uses. A practice so general could not escape the notice of the legislature ; and therefore, in some general acts, as in 21 Rich. 2, c. 3, and in some particular ones, as in the case of the Duke of Northumberland,³ forfeitures for treason were extended not only to the lands, of which the person attainted was himself seised, but to those whereof he was seised as *cestui que use*.

During the reigns of Henry the Fourth, Henry the Fifth, and Henry the Sixth, I find only three statutes relating to *trusts*. The statutes of 4 Hen. 4, *c. 7, [*18] and 11 Hen. 6, c. 3, were enacted to confirm and enlarge the 1 Rich. 2, c. 9, before stated.⁴ But by the

³ See the Year Book, 11 Hen. 4, 52, pl. 30.

⁴ [Pa. 13 ; see Co. Litt. 286, b.]

5th chap. of the 11 Hen. 6, it appears, that tenants for lives or years, who were subject to actions of waste by the reversioner, upon their commission of it, had taken advantage of the doctrine of trusts, in order to escape punishment, by conveying their estates to friends in trust for themselves, and afterwards committing waste upon the lands at their pleasure; they still continuing to occupy the premises, and to take the profits to their own use: for the reversioner being ignorant of the *legal* owner of the lands, did not know against whom to bring his action: "It is therefore ordained and established, that they in the reversion, in such case, may have and maintain a writ of waste against the said tenants for term of life, of another's life, or for years, and so recover against them the place wasted, and their treble damages for the waste by them done, as they ought to have done for the waste committed by them before the said grant and lease of the estate."

In the 5th Hen. 5,⁶ it appears, that a case arose, upon the nature and extent of the estate of *cestui que use*. A man being seised of a manor to which an advowson was appendant, conveys the manor to feoffees to his own use, and afterwards is outlawed in an action of debt. During [*19] the outlawry, *the church becomes vacant, and the *cestui que use* presents to the church; the king brings his *quare impedit*, and the case was determined in his favour; for *cestui que use*, as tenant at will to his feoffees, had a possession, which was forfeited to the crown by the outlawry.

But the great point seems to have been settled in the 4th Edw. 4,⁶ that *cestui que use* could obtain no relief in the courts of common law against his feoffees, but must rely upon the equitable jurisdiction of the Court of Chancery. But even in this king's reign the principles of equity were so little understood, that it was determined, that the *subpoena* did not extend to the *heir* of the feoffee, who was in by law; but relief in such cases could only be had by his bill in parliament.⁷

⁶ Year Book, 5 Hen. 5, 3, 6. Bro. Feoff. al. Uses, pl. 45.

⁶ 4 Edw. 4, 8, b. pl. 9.

⁷ Year Book, 8 Edw. 4, 6. 22 Edw. 4, 6. Carey, 13. But this was soon remedied. See Keilw. 42, b. They who wish to examine the early decisions

From the 11th Hen. 6, to the reign of Rich. 3, (which includes a space of fifty years,) the Statute Book is totally silent upon the subject of uses. From this circumstance Sir Francis Bacon concludes, and there is ground to believe, that uses were most favoured about that time. The statute *of 1 Rich. 3, c. 1, materially increased the power of the cestui que use. [*20]

This statute recites, "That forasmuch as by privy and unknown feoffments, great usurety, trouble, costs, and grievous vexations daily grow betwixt the king's subjects, insomuch that no man that buyeth any lands, tenements, rents, services, or other hereditaments, nor women that have jointures or dowers in any lands, tenements, or other hereditaments, nor men's last wills to be performed, nor leases for term of life or years, nor annuities granted to any person or persons, for their services for term of their lives, or otherwise, be in perfect surety, nor without great trouble and doubt of the same, because of such privie and unknown feoffments: for the remedy whereof it is ordained, established, and enacted, by the advice of the lords spiritual and temporal, and the commons in this present parliament assembled, and by authority of the same, that every estate, feoffment, gift, release, grant, leases, and confirmations of lands, tenements, rents, services, or hereditaments, made or had, or hereafter to be made or had, by any person or persons being of full age, of whole mind, at large, and not in duress, to any person or persons, and all recoveries and executions had or made, shall be good and effectual to him to whom it is so made, had, or given, and to all others to his use, against the seller, feoffor, donor, or granter thereof, and against the sellers, feoffors, donors, or granters, his or their heirs, *claiming [*21] the same only as heir or heirs to the same sellers, feoffors, donors, or granters, and every of them, and against all others having or claiming any title or interest in the same, only to the use of the same seller, feoffor, donor, or granter, sellers, feoffors, donors, or granters, or

upon uses and trusts, may be assisted by the following references to the Year Books. 9 Hen. 4, 8. 12 Hen. 4, 21. 1 Hen. 5, 4. 33 Hen. 6, 15. 5 Edw. 4, 7, 8. 7 Edw. 4, 14. 18 Edw. 4, 11. 7 Edw. 4, 29, 17, and generally to Bro. tit. Feoff. al. Uses.

his or their said heirs, at the time of the bargain, sale, covenant, gift, or grant made : saving to every person or persons such right, title, action, or interest, by reason of gift in tail thereof made, as they ought to have had if this act had not been made."⁸

VI. This statute was evidently intended for the benefit of purchasers, by giving the cestui que use an alienable power over the possession, as well as the use. But the intention of the legislature was frustrated ; for the statute did not deprive the feoffees of the power of alienation ; and consequently if they aliened the land for a valuable consideration, and without notice, previously to any disposition made by cestui que use pursuant to the statute, such alienation disabled cestui que use from exercising the power which the statute meant to afford him. Besides this inconvenience, there was a still greater produced by the statute ; for it often occasioned a kind of double-handed proceeding, or fraud, both in the feoffees and cestui que use. The feoffees had a power over the possession by the common law, and the [**22] cestui que *use by the statute. They often colluded, and by making secret and different feoffments, they purposely defeated each other's alienation, with a view to deceive purchasers.

(1.) It has been a question of some importance, and perhaps never decided, whether in some cases any or what part of the estate of the feoffees continued in them after the feoffment of, or alienation by, the cestui que use.

If cestui que use in fee-simple had made a feoffment in fee-simple, according to the stat. 1 Rich. 3, c. 1, it seems, that the whole interest of the feoffees was thereby conveyed. So if there had been cestui que use in fee-simple, and he had made a feoffment in fee-simple, upon condition of re-entry, and the condition was afterwards broken, and the cestui que use had entered ; the estate of the feoffees was not restored by such entry.⁹

But notwithstanding the alienation of cestui que use

⁸ [This saving applies to tenant in tail of the *legal* estate, and not to tenant in tail of the *use* : vide p. 29.]

⁹ 21 Hen. 7, 25. Bro. tit. Feoff. al. Uses, pl. 18. Co. Litt. 103, a.

in fee had this effect by the statute of 1 Rich. 3, there was a distinction, when *cestui que use* had only a limited estate in the land, as an estate for life or in tail, with a remainder over.

In a case¹ in the seventh year of Edward the Sixth's reign, one Davis, being seised in fee, *enfeoffed J. L. and others in fee, in the 19th year of Henry the Eighth, to the use of his wife for life, remainder to his brother in tail, remainder to B. H. in tail, remainder to the right heirs of the feoffor. Afterwards, in the 24th Hen. 8, Davis and his wife levied a fine with proclamation to Sir H. W. and others in fee, to the use of Sir H. W. and his heirs in fee. The brother, the first in remainder, joined in this fine. Sir T. W., son and heir of Sir H. W., bargained and sold the lands to the king in fee. After this the brother died without issue, and then the wife died. J. L., the surviving feoffee, brought his petition, and this matter was found by the verdict. In arrest of judgment it was alleged on the part of the king, that the petition did not lie for the feoffee, because the fee-simple of the use was lawfully conveyed to Sir H. W.; and therefore J. L., the feoffee, could not enter to revive the use; because he could not be seised of the fee-simple in the same manner as he was before the alienation. This case does not appear to have been determined; and therefore Dyer adds, “et ideo quære inde.”

However, in a case sent from the Chancery for the opinion of the Judges,² they were in favour of this opinion. It was thus: there was *cestui que use* in tail, remainder over in tail, remainder to the first *cestui que use* (in tail) in fee. *Cestui que use* in tail before the 27th Hen. 8, made a *feoffment in fee to the use of himself for life, [*24] remainder to his first son (being heir in tail), and his wife for their lives, remainder to the use of the heirs of their bodies, remainder to the use of the right heirs of the feoffor. The statute 27 Hen. 8, c. 10, is passed, and the feoffor dies. The son and his wife enter: and then the first feoffees enter, to revive the former uses in tail.

¹ Davis's case, Dyer, 88, b., 89, a.

² Baskerville's case, Dyer, 329, b., 330, a. Vide Dyer, 58, a.

Dyer and Manwood were both of opinion, that the entry of the feoffees was unlawful; for that the fee-simple in the use was lawfully transferred, and the right of the feoffees bound by the statute of 1 Rich. 3. Therefore, by their entry, the feoffees could not have their former estate; that is to say, the fee-simple. This opinion was sent into Chancery, by those Judges, and Catlyn and Saunders were of the same opinion.

On the other hand, it was expressly stated, in the beginning of the reign of Henry the Seventh,³ that if cestui que use *in tail* made a *feoffment* in fee, the feoffees might enter after the death of cestui que use in tail, for the purpose of revesting the former uses; and that a feoffment by cestui que use *for life* operated only upon his estate for life; and consequently did not create a forfeiture. This opinion, it seems, was adopted in the reign of Henry the Eighth; for Brooke⁴ says, that there [*25] *was then no occasion for entry or claim, within the five years, to avoid a fine levied by cestui que use *for life* with proclamations; such fine not working a forfeiture. The rule, that neither a feoffment nor fine by cestui que use for life amounted to a forfeiture of his estate, must have been established upon one of these grounds; that by the feoffment or fine the use and legal estate passed to the grantee *during the feoffor's life*, while the remainder continued in the first feoffees; or that, by the fine or feoffment, a base fee passed to the grantee, determinable upon the death of cestui que use by the entry of the feoffees.

Delamere's case⁵ was in substance, thus: R. D. in the 13th Hen. 8, enfeoffed T. S. and others in fee to the use of himself and his wife, and the heirs of their two bodies; and in default of such issue, remainder to R. D. in tail; remainders over. R. D., in the 26th Hen. 8, enfeoffed W. D. in fee; afterwards R. D. died, and the heir of the surviving feoffee entered to revive the ancient uses; and upon solemn argument it was held, that the entry of the feoffees was lawful. It was said in this case, that by the

³ Bro. tit. Feof. al. Uses, pl. 22, 4 Hen. 7, 18. [See also Dyer, 58, a, p. 5.]

⁴ Bro. tit. Fines, pl. 107. Vide also Dyer, 57, b. p. 1, as to a lease by cestui que use for life. [Zouch's case, 7 Bac. Abr. 186.]

⁵ Plowd. 348 to 353. 1 Co. 128.

feoffment of R. D. the fee-simple in the lands passed; but that after the death of the feoffor the feoffees might re-enter to revive the ancient uses; but that, although this right of entry remained in the feoffees, yet *until [*26] their regress the fee-simple was out of them. This case was considered as establishing a principle different from the determination in the case cited from Dyer; and it was observed, that this was determined upon solemn argument, but that from Dyer was only the opinion of the Judges, without any argument.⁶

The case⁷ from Dyer appears irreconcileable to the first case cited from⁸ Brookes's Abridgment; but perhaps it is not altogether inconsistent with Delamere's case. The statute of Richard renders the feoffment of cestui que use valid against all claiming any title or interest in the lands only to the use of the feoffor *or his heirs*. Now when the feoffor in the latter case died, the feoffees did not claim to the use of the heirs, but of the wife, of the feoffor; in which case they were neither restrained by the statute, nor the common law. But in the case from Dyer, the first feoffees certainly did claim to the use of the *heir* in tail of cestui que use. The only doubt appears to have been, whether the words of the statute, "claiming the same *only as heirs* of the feoffor, &c.," should extend to the heirs *special* as well as *general*.⁹

If the case from Dyer be correct,¹ a feoffment *by cestui que use *in tail*, after the statute of [*27] Richard the Third, had the same operation in barring the claims of the issue, as a fine would have had.² I say, as a *fine* would have had; for notwithstanding the effect of it was at first doubted, it appears to have been settled,³ that a fine would have bound the issue in tail of cestui que use, and also the entry of the feoffees, while they claimed to *the use of the issue*. But according to the doctrine in Delamere's case, neither the feoffment nor the fine would have barred any remainder expectant on the determination of the estate tail; for whenever the

⁶ 1 Co. 128, b. 129, a.

⁷ [Baskerville's case, p. 23, ante.]

⁸ [Pl. 22, 4 Hen. 7, 18.]

⁹ See B. N. C. 147.

¹ Dyer, 329, b. 330, a. [Baskerville's case.]

² Sed contra, Year Book, 19 Hen. 8, 13. 4 Hen. 7, 18.

³ B. N. C. 146. March, N. C. 140. Year Book, 27 Hen. 8, 20.

entail ceased, the feoffees would have had a right to enter to revive the ancient uses; in that case they would not have claimed to the use of the feoffor, or his heirs, but to the use of a stranger. I must observe, that Gilbert,⁴ in his Treatise on the Law of Uses and Trusts, seems to have been in an error, when he asserts, that a recovery suffered by a cestui que use in trust, did not, after the statute 1 Rich. 3, bind the issue in tail; for notwithstanding the doubt entertained in 30 Hen. 8,⁵ it appears from the words of, and the subsequent construction upon, the statute, that the recovery bound the issue claiming as heirs *only* of the grantor or recoveree.⁶

[*28] *(2.) When the statute 1 Rich. 3 passed, the use, as Sir Francis Bacon observes,⁷ appeared "in his likeness; for there is not a word spoken of *taking the profits* to describe a use by, but of *claiming to a use*." The statute does not even mention the words *trust* and *confidence*, which are so particularly expressed in the statute 27 Hen. 8, c. 10. It is evident, that the statute extended merely to uses declared upon a seisin or legal estate in fee;⁸ and that a trust or confidence declared upon the seisin or estate of a tenant in tail, or for life, or the possession of a lessee for years, was not a fiduciary interest, within the meaning of the use described by the statute. This construction was adopted, when courts of equity, tinctured with the prejudices of the common law, had conceived, that the estates of tenant in tail, for life, and years, were from their nature incapable of being conveyed to a use.

For as to the estate or seisin of a tenant in tail, it was held, that no use could be limited upon it: 1st, because the tenure of itself created a valuable consideration; 2nd, because the statute *de donis* had appropriated and fixed [*29] the estate tail to the *donee and the heirs of his body, so that neither he, nor they, could execute

⁴ Gill. *Uses*, 32.

⁵ Vide Bro. N. C. 147.

⁶ "It was holden *per plures* in the Chancery, if a recovery be had, in which cestui que use in tail is vouched, and the demandant recovers, then this shall bind the issue." Bro. Feoff. al. *Uses*, pl. 56. March's N. C. 137. See also the Year Book, 19 Hen. 8, 13. Bassett and Morgan *v.* Manzell, Plowd. 4.

⁷ Bac. *Uses*, 27.

⁸ See 1 Co. 128, a, b. Year Book, 19 Hen. 8, 13. 4 Hen. 7, 18. Bassett *v.* Manzell, Plowd. 3.

the use.¹ I must here observe, that the exception in 1 Rich. 3, extended only to tenant in tail of the legal estate, and not to cestui que use tenant in tail.¹

With respect to the estate or seisin of tenant for life, the consideration of tenure between the lessor and lessee appears to have been incompatible with the use. It is expressly stated in 2 Roll. Abr. 781, pl. 6, that if a lease be made for life, that shall be to the use of the lessee; and in Dyer (8 b.) it is said, that "if the feoffees make a lease for life, or an estate tail; in these cases if they be argued closely, the law will prove, that the lessee or donee cannot be seised to an use." This I apprehend to have been the law, notwithstanding any inference to the contrary, which may be raised from an expression in Brooke, Feoff. al. Uses, pl. 40, that where rent is reserved, there, though a use is expressed to the donor, it is a consideration, that the donee shall have it to his own use. The point, indeed, now, is rendered of no importance, as the stat. 27 Hen. 8 certainly extends to a trust declared upon the seisin of a tenant for life. But in fact, there could have *been no difference between [*30] a lease for life, and a lease for years; and I shall proceed to show, that a trust declared upon the possession of a tenant for years, was not within the statute of 1 Rich. 3; and indeed it is of real consequence that this point should be understood.

To apply this learning to modern practice, and to put a probable case: suppose A. possessed of the legal and absolute interest for one thousand years, and that he assigns over his term to B. in trust for himself, and then makes a feoffment in fee.² This plan is frequently adopted for the purpose of acquiring a freehold by disseisin, and at the same time of providing against a forfeiture of the term by the entry of the remainder-man. But the intention of the parties would be frustrated, sup-

¹ "It was adjudged by the advice of all the justices, that tenant in tail could not stand seised to a use. Year Book, 27 Hen. 8, 10, a. 2 Co. 78, a. Bro. Feof. al. Uses, pl. 40. Co. Litt. 19, b. Plowd. 555. 2 Roll. Abr. 780. Jenk. Cent. 195. Gilb. on Uses, 11, 205; and the Note to 22 Vin. 181, pl. 2.

¹ B. N. C. 146.

² [As to the objections to this plan, see Doe v. Lynes, 3 Barn. & Cress. 388, and tit. Feoffment, post, 2nd vol.]

posing the trust declared upon the term of one thousand years to be a *use* within the statute of 1 Rich. 3. In such case the *legal* estate of B. (according to Delamere's case, and the words of the statute) must pass by the feoffment of A. Now that feoffment must either create a freehold by disseisin, or it must operate merely to the extent of the term; the latter construction would not answer the purpose; and by the former, A. would be exposed to the forfeiture, which he intended to prevent. So it is usual for a tenant for life, who is about to make [*31] or concur *in a conveyance, which may expose him to the forfeiture of his life estate, to make a previous demise of the lands to a trustee for ninety-nine years (if he shall so long live) in trust for himself. It is therefore, as I observed before, of real consequence, that it should be ascertained, whether the trust of a term of years *can in any case* be considered within the statute of Rich. 3.

I conceive, that upon an attentive perusal of the authorities upon the subject, we may collect these points: first, That the statute of Richard was intended only to extend to *uses* properly so called; or in other words, it has never been construed to comprise such fiduciary interests, as at the time of the act were not cognizable by the Court of Chancery; and secondly, That a termor or lessee for years could not at that time stand seised either to an *implied* or *express* use; or, to explain myself more clearly, that the subpoena was not issuable against him for the purpose of compelling him to perform the trust declared upon his lease; because it was supposed, that the contract between the lessor and lessee, and the consideration upon which the latter took the lease, were incompatible with, and repugnant to, the nature of a use, declared to any other person.

I mention this rule as the construction of the Court of Chancery, before the statute of uses, when it is well known, that that court still favoured the conclusions of [*32] the common law. *The use or trust declared upon the estate of a lessee for years, was, in fact, the *jus precarium*; the cestui que trust having nothing to depend upon, but the honour and conscience of his

trustee. It was not till after the statute of uses, that the Court of Chancery, acting upon more liberal principles, and being under the necessity of once more watching over the consciences of men, found an opportunity of supporting that as a *trust*, which the courts of common law rejected as a *use*, and of adopting a system in respect to the former, which is attended with all the benefits, and without any of the inconveniences, of the latter. On the other hand, the courts of equity have never considered any fiduciary interest as a *use*, which was not considered as such before the statute 27 Hen. 8. Such a construction would not have answered the purposes of equity. Thus, for instance, no use, as I have mentioned, could be declared upon a lease for years, and it was not within the statute of 27 Hen. 8; yet the Court of Chancery conceived, that the confidence reposed in the lessee was as much to be observed in equity, as any other kind of use or trust. How was this confidence to be supported? Certainly not as a use, but as a trust, which the Court of Chancery could fashion according to the more modern notions of equity. If it had been supported as a use, it must have been adopted with all its defects. But it is certain, that the trust, declared upon a term of years, differs in most essential points, from what a use formerly was.

*Thus, all the questions concerning the capacity [^{*33}] of persons to stand seised to a use are avoided in the case of modern trusts; as the courts of equity fasten the trust upon the estate, and not upon the person. So there could be no implied use upon a lease for years,³ but trusts by implication are perhaps more frequent upon terms for years, than any other kind of property.⁴ The wide difference in their construction between a modern trust of a term of years, and a use before the statute of uses, forms, in my opinion, a very conclusive reason in favour of the position before submitted, that the former never has been, nor can be considered as the use described by the statute 1 Rich. 3.

³ This is a point universally acceded to by writers on the subject. See the cases before cited, and Perk. s. 536. Dyer, 10, a.

⁴ See also many other instances, post, ch. 3.

I shall now add the authorities confirming the points in question; from which it will be perceived, that although the Court of Chancery, soon after the death of Henry 8, had in some measure overcome its scruples, by allowing the *subpoena* to issue against the lessee for years, being a trustee; it was not till after the reign of Elizabeth, that the trusts declared upon a term were held even assignable in equity; it being at the same time recollectcd, that a *use* was always transferable in Chancery.⁵

*It may not be improper to premise, that the [*34] title of the act of 1 Rich. 3, c. 1, is in these words: "All acts made by or against a *cestui que use* shall be good against him, his *heirs* and *feoffees* in *trust*." It would be impossible to use words more inapplicable to a trust declared upon a possession of a lessee or assignee for a term of years. The word *seized*, in the statute of uses, 27 Hen. 8, was held sufficiently expressive to exclude leases or terms for years: it appears to me, that the words "*feoffees* and *heirs*," as fully express the meaning of the legislature.

The Lord Chancellor, in Easter Term, 22 Eliz.,⁶ put this question to the judges: A. being possessed of a lease for a term of years, granted all his *estate* and *interest* to B. and C. and their assigns, to the use of the said A. and his wife, for the term of their lives, and of the longer liver of them: and afterwards the said A. gave to a stranger such interest as he then had in the said lands in lease, and died: whether this grant made by A. gave all the term of B. and C. or not? And it was answered by all the justices and the chief baron, that the gift or grant of him, in trust for whom the term was granted, was void and out of the *statutes of cestui que use*: and in [*35] a note by the *editor it is said, "and 1 R. (c. 1) and 27 Hen. 8," for which he cites Ridley's case. The observation which Crompton (who wrote in the

⁵ Upon examining the reference to Brooke, pl. 60, and Crompton, 66, a, in the second edition of this work, there appears to be a mistake in the passage. The words in the original are, "notwithstanding the *statute 1 Rich. 3.*" Upon consideration, however, the reference is evidently to the *statute 3 Hen. 7, c. 4*, and not to the *statute of Richard*; and consequently not applicable to this place.

* Dyer, 369, a.

latter part of Elizabeth's reign) makes upon the case from Dyer, is much to the purpose: "Mes donc d'un terme pur ans al use est bon matter *a c'est jour* in conscience, et que il avera *subpeea* in le chauncerie." This remark clearly proves, that *cestui que trust* of a term was not *formerly* entitled to the subpoena.

Jenkins, mentioning this case (244, case 29), says, "The husband cannot assign this *trust*, for a *trust is nothing in law*, and *uses* being abolished and joined to the possession, this *trust* cannot be said to be a *use*." In page 245 he adds, "Equity gives relief upon a devise; but not upon an *assignment of a trust*." It must be observed, that Jenkins was speaking of the *trust* of a *term for years*.⁷

In the case of Sir Moyle Finche⁸ it was resolved by all the justices, "that a *trust* could not be *assigned*, because it was a matter in privity, and was in nature of a chose in action, for *cestui que trust* had *no power of the land*, but only to seek remedy by *subpeona*, and not like to *cestui que use*, for thereof there should be *possessio fratriss*, and *he should be sworn on juries in respect of [*36] the *use*, and he had power over the land by the statute of 1 Rich. 3." Here then the distinction contended for is acknowledged by all the judges, and afterwards by the Chancellor; and it is observable, that Sir Edward Coke, as an instance of the *trust* just described, cites the above-mentioned case from Dyer.

Gilbert, in his Law of Uses,¹ is of opinion, that if A. had assigned over the *land* itself in the case taken from Dyer, it would have been good by 1 Rich. 3; but the words he used were not sufficient to pass the land itself, for he had no *interest* therein. But of this notion it is sufficient to observe, that it is not only directly contrary to the authorities before quoted, and to the reason of the thing, but would, if adopted, subvert the established practice of the profession. Besides, there is an evident absurdity in the distinction between the grant of the

⁷ Crompton, 66, a. See also *Rooke v. Staples*, Cary's Rep. 76. 21 & 22 Eliz. where there was a decree in favour of a *cestui que trust* of a term.

⁸ [Trusts, whether of a term or larger estate, even the possibility of a trust, may now be assigned in equity: vide post.]

¹ 4 Inst. 85.

Gib. Uses, 199.

land itself and of an *interest* therein; for it is clear, that the statute 1 Rich. 3 gave *cestui que use* an *interest* in the land; and therefore if *cestui que* trust of a term had been considered as a *cestui que use* under that statute, the grant of his *interest* would have been as operative as the grant of the *land* itself, for the purpose of passing the legal estate in the term.²

*In a late case,³ where there was an outstanding satisfied term of years (and consequently attendant upon the inheritance), it was argued, that this term was within the stat. Rich. 3; and that the legal interest therein passed by a conveyance of the inheritance. But it was unanimously held, that the statute Rich. 3 was not applicable to that case.

A case lately came before the courts of law, the decision of which has created some interest in the profession.⁴ John Dormer, lord of the manor of Mear, by indenture dated the 3d of December, 1743, demised to Charles Fennell a messuage, &c. part of the lord's waste, for ninety-nine years, under the yearly rent of two shillings and sixpence. The lease, by mesne assignments, became vested in James Moody, who, by indenture dated the 1st of March, 1815, assigned the residue of the term of ninety-nine years to John Nash, subject to the yearly rent of two shillings and sixpence; in trust, nevertheless, to attend the uses limited by a feoffment bearing date the 16th of the then instant March, and made between James Moody, &c. By indenture of feoffment perfected by livery of seisin, dated the 16th day of March, 1815, James Moody enfeoffed J. Jaques to uses therein limited for the benefit of James Moody, his apprentices, heirs, and assigns, of the said messuage, &c. and covenanted to levy a fine to the same uses. The fine was levied, and the rent of two shillings and sixpence was continued to be regularly paid. In consequence of these transactions, the reversioner brought his ejectionment for recovery of the possession, by reason of a forfeiture supposed to have been committed by the

² Vide Co. Litt. 345, b. 3 Co. 24, a.

³ Goodtitle dem. Jones v. Jones, 7 Term. Rep. 47.

⁴ Doe dem. Lord Dormer v. Moody and others, Michaelmas Term, 57 Geo. 3.

feoffment. The cause was tried before Thompson, Chief Baron, on the 29th of July, 1817.

It will be observed, that in the trusts declared concerning the term, reference is made to the feoffment *made* (i. e. already made) in trust for James Moody and his heirs. The Chief Baron, in summing up to the jury, put it on the ground of fraud; and after the defendant's counsel had asked the judge to save the point, which was refused, the Chief Baron directed the jury to find a verdict for the plaintiff, thinking that the defendants were estopped by the deed from saying, that the assignment was before the feoffment; because the assignment refers to the feoffment as existing; "as made."

Upon a motion for a new trial, a rule to show cause was granted; a new trial was ultimately refused by the Court of King's Bench; but I am not accurately informed upon what ground.⁵

*It does not appear that the case turned on the [*39] statute Rich. 3. It was determined either on the ground of the estoppel, or on the effect of fraud arising from the payment of the rent before and after the feoffment; and if on the ground of fraud, the fraud had the effect of avoiding the deed, as completely as a deed might have been avoided under a plea of *non est factum*.

It will not be readily admitted, that the assignment was considered absolutely void on account of fraud; for, although Lord Kenyon, in the case of *Doe dem. Willis v. Martin*, 4 Term Rep. 39, observing on the facts in that case, which arose upon the execution of a power by *deed*, says, "This then was gross, rank fraud, and contaminates the whole transaction, and renders it absolutely void in a *court of law*, as well as in a *court of equity*; yet it would not be easy to discover the grossness of fraud in the case under consideration. A person not incapacitated, having a term of years, may lawfully assign it, and I know of no restriction against his subsequently making a feoffment of the same land;" and if the

⁴ [It does not appear that the above case of *Doe dem. Lord Dormer v. Moody*, has ever been reported. It is, however, referred to in *Doe dem. Maddock v. Lynes*, 3 Barn. & Cress. 399, and *Preston on Conveyancing*, 2d Edition, 32.]

⁵ [See the case of *Doe dem. Maddocks v. Lynes*, 3 Barn. & Cress. 388, and 5 Dowl. & Ry. 160, (decided since the above was written). It appears to follow,

[*40] operation of the *assignment and the feoffment were to bar the reversioner after the end of the term, in consequence of his negligence in not pursuing his remedy within due time, I see no more fraud, morally speaking, in the transaction, than in a person taking advantage of the statute of limitation, or of non-claim on a fine. But in the case in question the lessee either continued to pay rent, or he did not. In the former case, the feoffment and fine would be inoperative as between the lessor and lessee, without disturbing the term; and in the latter, the lessor would suffer the injury by his own negligence.

In all cases of this kind, no fraud is intended against the person in reversion. It is a mere contrivance to convert, during the term, the tenure or nature of the property into an estate of freehold, as between the termor and those claiming under him, either for the purpose of family arrangements, or for qualifications which an estate of freehold may confer. The practice of creating a freehold by disseisin, in the way above mentioned, and of preserving the term, is of the most ancient date, and it never had been, to my knowledge, questioned [*41] before the case which I have *stated. It would be dangerous to refine upon these notions of supposed fraud, because, by introducing variations in the system, the law would become inconsistent with itself, and hazardous in its application.

If A. B. having acquired an estate wrongfully, with positive notice of the right of C. D. to it, levies a fine with the avowed intention of destroying C. D.'s right by non-claim on the fine, it would be difficult to conceive a case of a more direct moral fraud; and yet I have never heard, that such a fine has been considered void by reason of the fraud.

from this case, that the attempt to create a freehold by the means above mentioned would be unavailing, unless to the prejudice of the party making such attempt, who is placed in this dilemma: if the assignee of the term be privy to the feoffment, then the term is forfeited; if, on the other hand, there be no such privity, then the feoffment itself is void for want of the concurrence of the party entitled to the immediate possession, such concurrence being requisite to give effect to the livery of seisin. And even if the assignee be not privy to the feoffment, it does not follow that the reversioner himself may not elect to treat the term as forfeited by the proceeding of the feoffor, although the attempt to acquire the freehold has proved abortive. See post, 2d vol. Tit. Feofment.]

It has been suggested, that by assigning the term to a trustee for the disseisor, the lessee acknowledges, by way of attornment, the reversion to be in a stranger, which, according to Sir Edward Coke (Co. Litt. 252, a), is an act of forfeiture; but the statute 11 Geo. 2, c. 19, s. 11, makes attornments to strangers absolutely void; and Sir Edward Coke, in the place above mentioned, expressly states, that "an attornment *in pais* worketh no forfeiture."

But to resume the subject, the judges in the above case (*Goodtitle v. Jones*) seem to consider the statute 1 Rich. 3, as applicable to certain cases which may now occur. The words of Mr. Justice Lawrence are, "With regard to the statute 1 Rich. 3, it does not seem to me to be applicable to this *case. The legislature, [*42] in passing that act, only intended, that where a person, having an estate in possession, conveyed it to a trustee to his own use, and afterwards conveyed it to a purchaser, he should not set up the estate in the *cestui que trust* (*trustee*) against the purchaser: that is, that he should not take advantage of his own fraud, and say, that the conveyance to the purchaser was defective on account of the legal estate not being in him, but being in his trustee."

In *Blake v. Foster*,⁷ Mr. Justice Lawrence also observed, that although the statute 1 Rich. 3 did not apply to the case of *Goodtitle v. Jones*, before mentioned, "on further consideration the court were of opinion, that it extended to other cases."

I have not, upon the most attentive consideration, been able to discover any case to which the statute 1 Rich. 3 is now applicable.

Previously to the statute of uses, property was divided into use and possession; and in all cases where both the use and possession were united in one person, he was complete owner of the legal and beneficial interest, to which united interests the statute of 1 Rich. 3 could not by any means extend. Since the statute of uses, 27 Hen. 8, if an estate be conveyed to A. and his heirs, to

⁷ Term Rep. 487, 494.

[*43] the use of B. and his heirs, in trust for C. and his *heirs, the possession or legal estate is vested by virtue of the statute in B. : but the use limited to B. was the use to which the statute of 1 Rich. 3 applied ; and the statute of uses, by converting the use into a legal estate, has virtually deprived the statute 1 Rich. 3 of the interest upon which it operated.* The trust declared for C. was an interest unknown before the statute of uses.

The same observation will apply to the case of a conveyance unto, “*and to the use of*,” B. and his heirs, in trust for C. and his heirs ; for, although in this case the legal estate is not vested in B. by virtue of the statute of uses, the use to which the statute 1 Rich. 3 applied, is limited to B. ; and by the union of the use and possession in him, he has every legal and beneficial interest known before the statute of 1 Rich. 3. That statute cannot fairly be applied to a fiduciary interest, created subsequently to it, in consequence of the constructive operation of the statute 27 Hen. 8.

The remaining case to be considered, is the special trust before noticed. A conveyance is made to A. and his heirs, without any express declaration of the use, upon trust, or to the intent, that he shall convey to B. ; or to the intent, that he shall be a tenant to the præcipe for [*44] suffering a *common recovery ; or to the intent, that he shall reconvey to the grantor. In all these cases, a seisin is transferred to A. by the course of the common law ; and as the special trust or intent must necessarily prevent the use from resulting to the grantor, the grantee must have a complete legal estate without the aid of, and unaffected by, the statute of uses, 27 Hen. 8. That statute uses the word *trust*, as well as *use*, and, assisted by the former word, it may extend to beneficial interests, not within the statute 1 Rich. 3 ; as for instance, to the trust declared upon the estate of tenant for life ; and, as it is conceived, to the use or trust declared upon the seisin of tenant in tail. But there is no ground to contend, that the statute 1 Rich. 3, which adopts the

* This point is properly suggested by Mr. Sugden, in his edition to Gilb. Law of Uses and Trusts, 67, to whose note I must beg to refer.

word “*use*” only, can extend to any fiduciary interest not executed at this time by the statute of uses: that the word *use*, in the statute 1 Rich. 3, should have a more extensive operation than in the statute 27 Hen. 8.

The practical consequences would be extremely injurious, if special trusts of this kind were considered within the stat. 1 Rich. 3. Thus, if a tenant in tail conveyed for the purpose of making a tenant to the precipice for suffering a recovery, which recovery when suffered should enure to the use of himself in fee; he might, by inadvertently conveying the freehold previous to suffering the recovery, render such recovery inoperative. Other cases might be produced of a similar nature.

*It remains to be observed, that by the statute [*45] of 50 Edw. 3, c. 6, the special trust there noticed was subject to an execution by a creditor of the cestui que trust; but the estate of cestui que use was not extendible till the 19 Hen. 7, c. 15. From this it appears, that the legislature did not consider the use and special trust to be the same.

(3.) Perkins says,⁹ “If cestui que use be of a reversion, he may grant the same as well as if he were in possession, and that by the statute of Richard 3, made in the first year of his reign, *cap. 1.*” But Perkins, in this instance, cites no authority in support of his assertion, and he is clearly wrong. His position is contradicted by the determination in Delamer’s case,¹ in which it was decided, that the statute only intended to give the *present* possessor of the use a power of alienation, and did not extend to those in remainder or reversion.² Upon the same principle, the statute did not extend to cestui que use, who had only a naked right to the use, the establishment of which depended upon the entry of his feoffees.³ But if the feoffees to uses had been disseised, and cestui que use had released to the disseisor; or if [*46] the disseisor had enfeoffed *cestui que use, who

⁹ Perk. s. 98. Perkins is also wrong (as the authorities before cited prove), when he asserts, that tenant in tail, for life, or for years, could stand seized to an express use before the statute 27 Hen. 8. See Perk. 537.

¹ Plowd. 348, 350. 1 Co. 128, a, b.

² Bro. Feof. al. Uses, pl. 44. B. N. C. 75.

³ Plowd. 351. Gilb. Uses, 27, 28.

had enfeoffed a stranger; in either case, the entry of the feoffees was barred.⁴

(4.) Cestui que use, by this statute, might have made a lease for years, rendering rent, for which he might have brought his action, but could not have avowed:⁵ and a reservation of rent by cestui que use, would have carried it to the heir, although not particularly named for that purpose.⁶ But notwithstanding cestui que use was enabled to make a lease for life or years, the reversion was still in the feoffees, who might have brought an action notwithstanding the want of privity.⁷

(5.) Cestui que use could not *devise* the *lands* by the equity of 1 Rich. 3.⁸ This construction was adopted for obvious reasons. Although the statute established the legal conveyances of cestui que use, neither the words nor the equity of it enabled him to convey the possession of his trustees by an instrument at that time not applicable to the transfer of real property: for lands before the statute 32 Hen. 8⁹ were not devisable.

[*47] *(6.) It was also said, that if a lord, or a grantee of a rent-charge, had been also cestui que use of the *land*, and after the statute of 1 Rich. 3, cestui que use had made a feoffment in fee; although the land passed from the feoffees, and his feoffment was warranted by the statute, yet the seignory or rent-charge was extinguished.¹ And, further, it was determined that the land of cestui que use was bound by his statute merchant, statute staple, and by elegit, by the statute 1 Rich. 3, c. 1.²

VII. But to proceed in the historical account of uses: Richard the Third, when Duke of Gloucester, had frequently been made feoffee to uses. Now, as the king

⁴ Plowd. 351, 352.

⁵ 27 Hen. 8, 13. Bro. Feof. al. Uses, pl. 6.

⁶ Ibid. pl. 18.

⁷ Year Book, 5 Hen. 7, 5, b. See the Year Book, 27 Hen. 8, 13, b. "If *cestui que use* in fee make a gift in tail, of whom shall the tenant in tail hold? *Deinshil. Comm me semble de nulluy. Fitzh.* Bien dit, par ma foi, il est cler q'il tient de les feoffees."

⁸ Dy. 74, a, 143, a.

¹ Co. Litt. 52, a. Gilb. Uses, 31.

² Year Book, 7 Hen. 7, 6. Bro. Feof. al. Uses, pl. 25. [In the Year Book, 7 Hen. 7, 6, the report concludes with "Quære bene." But it will be seen presently (p. 49, post,) that the 19 Hen. 7, c. 15, expressly subjects the lands of cestui que use to his debt by judgment, statute merchant, &c.]

could not be seized to a use, upon the assumption of the crown, Richard would have held the lands discharged of the uses. Therefore, as Sir William Blackstone observes,³ to obviate so notorious an injustice, an act of parliament⁴ was immediately passed, which ordained, that where he had been so enfeoffed, jointly with other persons, the land should vest *in the other feoffees, as if he had not been named; and that where [*48] he stood solely enfeoffed, the estate itself should vest in *cestui que use*, in like manner as he had the use.

The first act of parliament, which passed in the succeeding king's reign, related to uses.⁵ The statute 1 Hen. 7, made a *formedon* maintainable against the pernors of the profits of land enfeoffed to uses. It is also allowed the tenant in the same action to have *aid prayer, voucher, age*, and other advantages.

This statute, which gave a formedon only by express name against *cestui que use*, was construed to extend to a *scire facias* to execute an estate tail in remainder by equity.⁶ But in the construction of this act, it was held in a case,⁷ where *a *scire facias* was brought against [*49] the pernor of the profits, that the pernor should not vouch; for it should be intended in such action, in which he might vouch: and that the words of the act did not alter the law of vouchers, and give to the pernor any new voucher.

Among the inconveniences which attended the introduction of uses, it was found that lords lost the benefit of wardship; and, therefore, by a statute 4 Hen. 7, c.

³ 2 Com. 332.

⁴ 1 Rich. 3, c. 5. Those lands, whereof the king was enfeoffed jointly with others to the use of the feoffor, shall be in his coseffees.

⁵ "First, that where divers of the king's subjects having cause of action by formedon in the descender, or else in the remainder, by force of any tail for lands and tenements, be defrauded and delayed of their said actions, and oftentimes without remedy, because of feoffments made of the same lands and tenements to persons unknown, to the intent that the defendant should not know, against whom they shall take their actions; it is ordained, that the demandant in every such case have his action against the pernor or pernors of the lands, &c. demanded, whereof any person or persons had been enfeoffed to his or their use; and the same pernor or pernors named as tenant or tenants in the said action, have the same vouchers, and their lien thereupon, aid prayer, and all other advantages, as the same pernor or pernors should have had, if they were tenants indeed, or as their feoffees should have had, if the same action had been conceived against them," &c.

⁶ 1 Co. 131, b.

⁷ 11 Co. 62, b.

17, the statute of Marlbridge was confirmed ; and it was also provided, that the heir of cestui que use of lands held by knight service, being within age, should be in ward ; and being of full age, should pay relief. On the contrary, for the benefit of the heir of cestui que use, the same statute provided, that he should have an action against his guardian committing waste.

[*50] By the 19th Hen. 7, c. 15,⁸ the lands of cestui que use were made subject to execution for his

⁸ [This act, of which the purport only is shortly stated in Ruffhead, (the act itself being considered by him to be obsolete since the 27 Hen. 8, c. 10,) is as follows:

" De execucionibus contrâ feoffatos faciendis.

" Prayen the comons in this present parlement assembled, that where divers and many personnes be defrauded of ther execucion as well of and uppon recognizance, statutes of the staple, statutes merchantantes to them made, as of ther dettes and damages recovered in accion of dette, trespass, or other accions, and in like wyse the lordes of whom eny landes and tenementes be holden in socage of ther relefes, and sometyme of ther heriottes, be reason that he so beyng bounde or condempned, and also he that of ryght ought to be very tenuant to the lorde of whom suche landes and tenementes be holden, causeth be fyne feoffament recovery or otherwyse divers personnes to be seased of the seid landes, tenementes, and other hereditamentes onely to his use, he takyng the profettes of the same, to the grete herte, disceyte and defraude of all the kinge's true liege people within this his realme yf remedie be not therfore purveyd : In consideracion wherof be it ordayneid established and enacted by the king our soveraigne lorde by thassent of his lordes spirituall and temporall and the comens in this present parlement assembled and by auctoritie of the same that from henseforthe it shalbe laufull to every shereff or other officer to whom eny writte or precepte is or shalbe directe, at sute of eny persone or personnes to have execucion of eny landes tenementes or other hereditamentes ageyne eny persone or personnes of for and uppon eny condempnacion, estatute merchantante, estatute of the staple, or recognizance hereafter to be made or hadde, to doe make and deliver execucion unto the partie in that behalfe suyng, of all suche landes and tenementes as eny other persone or personnes be in any mannerwyse seased or hereafter shalbe seased, to the onely use of hym ageyne whom execucion is so sued, lyke as the seid shereff or other officer myght or ought to have done yf the seid partie ageyne whom execucion hereafter shall so be sued, hadde be sole seased of the seid landes and tenementes of suche estate as they be so seased of to his use at tym of the seid execucion sued.

" And over that be it ordeyned by the seid auctoritie that the lordes of whom eny such landes or tenementes be holden in socage shall frome henseforthe, after the deith of hym to whos use eny persone or personnes as is aforesaid be seased, and no wille therof declared, have his relef heriot and all other duetes, lyke as the said lorde ought or myght have hadde if he hade died seased of the same.

" Provyd allwey that every suche persone, ageynst whom execucion is or shalbe hadde of landes and tenementes soo beyng in possession of other personnes to his use, may have all suche avauntages in the lawe, ageyne hym or them that so have execucion of the landes tenementes aforesaid as he myght or shulde have hadde if he hade be sole seased of the seid landes and tenementes at tym of the seid execucion sued.

" And over that be it ordeyned by the seid auctoritie, that yf eny bondeman purches eny landes or tenementes in fee symple fee taile or for terme of lyfe or terme of yeres, and causeth estate to be made to divers personnes to his use, or takythe estate to hymselfe and to divers others joynlyt with hym and to his use

debt, by judgment, recognizance, statute merchant, and of the staple. The lands of *cestui que use holden in socage*, were also made liable to satisfy *the lord his relief, heriot, and other duties. *Cestui que* [*51] use also was allowed to have the same advantages he might have had, if he had been tenant of the land. And, lastly, the lands of *cestui que use*, being a bondman, were made seizable by the lord.

VIII. We have seen,⁹ that by the statute of 15 Rich. 2, c. 5, lands conveyed to the use of religious houses, or bodies corporate, were amortized by license from the Crown. But that statute did not extend to conveyances in trust for parish churches, chapels, churchwardens, companies, fraternities, &c. erected by *common assent*, and not being bodies corporate. Now these alienations were as prejudicial to the lords, as alienations in mortmain: for they thereby lost their wards, heriots, reliefs,¹ &c. To remedy this mischief the statute of 23 Hen. 8, c. 10, was made. It recites, **“That by reason of feoffments made of trust of manors, &c. to the [*52] use of parish churches, chapels, churchwardens, guilds, fraternities, commonalties, companies, or brotherhoods, erected or made of devotion, or by *common assent* of the people, *without any corporation*, and to the uses and intents to have obits perpetual, or any continual service of a priest for ever, &c., or to any other like uses and intents, there groweth to the king our sovereign lord, and to other lords and subjects of the realm, the same like losses and inconveniences, and is as much prejudicial to them, as doth and is in case where lands are aliened in mortmain: be it therefore enacted, That all and every such uses, intents, and purposes, of what name, nature, or quality the same shall be called, &c. shall be utterly void; and if any person, in default of this statute, do bind their heirs, &c. that then every such pain, penalty, craft, colour, and every other thing, &c. shall be utterly

and behoove, that it shalbe lauffull to the lorde of eny such bondeman to entre duryng the same use into the seid landes and tenementes and every parcell therof so purchased by his bondeman in lyke maner and forme as he myght have doone yf the seid bondeman hadde onely be seased of the seid landes and tenementes in fee or otherwyse.” The Statutes of the Realm, 2 vol. 660.]

⁹[Ante, p. 16.]

¹ Co. 23, b.

void : and that this statute shall be always interpreted, &c. most beneficially to the destruction of such uses, &c. and of all other like uses and intents."

I shall make a few observations on this statute. In the first place, it was made to prevent conveyances of land, &c. in trust for superstitious purposes, such as to pray for souls supposed to be in purgatory ; but it was not intended to prevent alienations in trust for good and charitable purposes ; such as finding of a preacher, maintenance of a school, relief and comfort of maimed soldiers, [*53] *sustenance of poor people, reparation of churches, highways, bridges, causeways, discharging of poor inhabitants of a town of common charges, for making of a stock for poor labourers in husbandry, and poor apprentices, and for the marriage of poor virgins, and other like charitable uses ; for, as it has been properly observed, " No time has been so barbarous as to abolish learning and knowledge, nor so uncharitable as to prohibit relieving the poor."²

2dly. This act did not make the conveyance itself void, nor did it give the lord any title to enter for mortmain (like the 15 Rich. 2, c. 5) : but it made the use void. Therefore if the feoffment had been within this statute, the feoffees (if no consideration had been expressed) would have stood seised, notwithstanding the declaration of uses, to the use of the feoffor and his heirs ; but if there had been a consideration, though merely nominal, the use would have vested in the feoffees.³

IX. I have now noticed all the statutes, which I am aware of, relating to uses, previously to the statute of 27 Hen. 8, c. 10. These statutes all tend to consider *cestui que use* as the real owner of the land ; and indeed he was made completely so by the statute 27 Hen. 8, c. 10. But it will be *necessary, in this place, to consider the learning of uses before that statute was enacted. Uses had undergone many refinements ; and although several acts were passed to prevent the injustice

² 1 Co. 24, a. 26, a.

³ 1 Co. 24, a. See *Attorney-General v. Whorwood*, 1 Ves. 536.

which these refinements produced, yet none of them were found effectual to remedy the evil.

I shall now consider the requisites to be observed in raising uses.

(1.) There should have been a person or persons capable of standing seised to a use. Generally every common person not incapacitated to take, by way of grant, could stand seised to a use: and, therefore, a feme covert, or an infant, might have stood seised to a use.⁴

A use was before described to be a trust or confidence, which was not issuing out of land, but as a thing collateral, annexed *in privity to the estate*, and to the *person* touching the land. It follows from this explanation of a use, that whenever the legal estate vested in a person, in whom the *confidence of person*, or *privity of estate* failed, the use was either destroyed, or for a time suspended.

Therefore, a lord by escheat, or of a villein, could not stand seised to a use; because the title of the lord accrued to him either by reason of the seignory of the land, or of the villein; which title *was higher than the use, [*55] or confidence, and therefore could not be subject to it. And the same rule applied to a lord, who entered for mortmain, or who recovered by a cessavit, &c.; for his title was paramount to the use.⁵

Tenant by the courtesy could not stand seised to a use; for he was *in* by the act of law in consideration of marriage, and was not *in* in privity of estate.⁶ And it seems, by the better opinion, that a tenant in dower could not stand seised to a use;⁷ and that for the same reason. This point, however, has been doubted by Gilbert, though he seems to acquiesce in it in another place.⁸ So neither could a disseisor, abator, nor intruder stand seised to a use, although he had notice.⁹ So if a feoffee to uses had bound himself in a statute, &c. and

⁴ Bac. Uses, 58. Bro. Feof. al. Uses, p. 51. Shep. T. 516.

⁵ 1 Co. 122, a. 139, b. B. N. C. 60. [As to an occupant, see p. 58, post.]

⁶ 1 Co. 122, a.

⁷ Ibid. See 22 Vin. 184, and the cases collected in the notes to pl. 15, 16. [Butler's note (1) to Co. Lit. 271, b. But quære,—as there appears to be a difference between tenant by the courtesy and tenant in dower, in respect of privity of estate, the former being in the *post*, whereas the latter is in *by* the husband, i. e. in the *per*. Co. Lit. 30, b. n. (7), 239, a.]

⁸ Gilb. Uses, 11, 171.

⁹ 1 Co. 122, a. 139, b.

the conuze had taken out execution thereupon, he would have held the land discharged of the uses.¹

[*56] Although there had been *privity* of estate, yet [*56] *if *confidence*, either expressed or implied, failed in the person, the use was destroyed, or suspended. Thus, if a feoffee to uses had for a valuable consideration enfeoffed another, who had no notice of the former uses, there was privity of estate, but no confidence in the person of the second feoffee; and consequently the use was gone.² If the feoffment had been made without consideration to a person, who had no notice;³ or upon a valuable consideration to one, who had notice;⁴ in each case the privity of estate, and confidence in the person, were preserved; and the feoffee took the estate subject to the former uses.

If there had been tenant for life, remainder in fee to the use of another, and the tenant for life had made a feoffment [in fee] to one who had notice, the feoffee could not have stood seised to the former use; for that use was annexed to one estate, and he was *in* of another.⁵

The king could not stand seised to a use; and therefore if lands had been conveyed to the king and a subject [*57] ject, *pour term de leur vies*, to certain uses, such uses were void as to a moiety of the *lands.⁶ Neither could the queen⁷ be a feoffee to uses.⁸

¹ Bro. Feof. al. Uses, pl. 10.

² 1 Co. 122, b. Abbot of Bury *v.* Bokenham, Dy. 8. 33 Hen. 6, 16.

³ 1 Co. 122, b. ⁴ Plowd. 351. Year Book, 5 Ed. 4, 7. ⁵ 1 Co. 122, b.

* Year Book, 7 Ed. 4, 17. Bac. Uses, 56, 57. Berkley's case. Plowd. 238, (e). See the cases collected in notes to pl. 4, in 22 Vin. 182. [But if the position that no use could be limited upon the estate or seisin of tenant for life be correct (*ante*, p. 29), the use mentioned in the text would have been altogether void. It is Bacon who puts the case of a conveyance to the king and a subject, *pour term de leurs vies*: and he seems to be speaking of uses since the statute; for after laying it down that neither the king nor the queen can stand seised to a use, he adds, "a corporation cannot stand seised to a use, chiefly because of the letter of this statute. The case is probably put of a conveyance for life merely, because the position is, that the king, even in his natural capacity (as distinguished from his corporate capacity, in which he never dies), could not stand seised to a use. See Berkley's case, *supra*. If the case intended to be cited from the Year Book be *T.*, 7 E. 4, 17, (in which it was held that the king could not be prayed in aid by a plaintiff after issue joined), it is probably referred to in support of the position, relied on as one reason why the king could not be seised to a use, that the king should stand impartial between his subjects. See 22 Vin. 4. In *M.*, 5 E. 4, 16, however, it is expressly laid down by Markham, C. J., that the king cannot be enfeoffed to the use of another.] ⁷ [Not merely an imperial queen, but a queen by marriage also.]

⁸ Bac. Uses, 57.

A corporation,³ abbé, mayor, commonalty, and persons attainted,¹ were under the like disability. So in a case, where an alien and another person *were enfeoffed [*58] to uses, the crown became entitled to a moiety of the land discharged of the uses.²

I have already stated the grounds and authorities upon which I conclude that neither tenant in tail, for life, nor years, could stand seised to a *use*. It must be added, that an occupant could not stand seised to a *use*.³

(2.) There should have been a person capable of receiving or taking the *use*.

As to this point it may be observed, that all persons capable of taking a conveyance of the lands, might have taken the same estate by way of *use*; therefore the limitation of a *use* to a corporation was good, if a license for that purpose had been obtained.⁴ So the king could have been *cestui que use* by matter of record; and therefore if a fine had been levied, or recovery suffered, and the *use* declared to the king by deed inrolled, the king would have been entitled as *cestui que use*, though he was not a party to the declaration.⁵ But it was necessary that both the declaration and conveyance should be matter of record.

*The limitation of a *use* to the parishioners of [*59] any particular place was void.⁶

Whether an alien could have been *cestui que use* was an undetermined point; some holding, that a *use*, being merely in conscience, equity might have directed the execution of it for the benefit of the alien;⁷ whilst others contended, that an alien could not have compelled the feoffees to execute the *use*; it being contrary to the

¹ [Because the subpoena did not issue against it. See post.]

² B. N. C. 60. Bro. Feof. al. Uses, 40. 1 Co. 122, a. Bac. Uses, 57, 58, 59. Dy. 8, b. See Halfpenny's case, Year Book, 14 Hen. 8, 8, a. 22 Vin. 182, 183, and the several cases collected in note to pl. 6, as to a corporation.

³ King v. Boys, Dy. 283, b. See cases collected in note to pl. 18, in 22 Vin. 184.

⁴ Bro. Feof. al. Uses, pl. 10. 22 Vin. 183, pl. 7. The case in Hard. 468, was a *trust*, and not a *use*. [7 Bac. Ab. 96.]

⁵ Shep. T. 509.

⁶ Bac. Uses, 60.

⁷ Year Book, 13 Hen. 7, 9, b. Bro. Feof. al. Uses, 29. Shep. T. 509. See 22 Vin. 247, (E. a.)

⁷ 12 Hen. 7, 28, a. Bro. Feof. al. Uses, pl. 29. Allen, 14. Vide Preamble to the Stat. 27 Hen. 8, c. 10, [wherein it is alleged that the king had lost the profits "of lands, craftily put in feoffments to the uses of aliens born."]

policy of the law of the kingdom, that an alien should plead or be impleaded touching lands in any of our courts.⁸

(3.) There should have been either a consideration to raise, or a declaration of, the use. Indeed, where an express declaration of the use was made on the feoffment, a pecuniary consideration, or the want of it, could not vary the use so declared.⁹ Therefore, if A. had delivered money to J. S. for the purpose of purchasing lands for him, and J. S. had purchased them *to his own use*, no *use could have resulted to, or be implied in A.¹ So if A. in consideration of 100*l.* paid to him by B. had enfeoffed B. and C.; the declaration of the use to B. and C. would have been good, notwithstanding the payment of the money by B. only.²

When no declaration of the use was made, the consideration paid by the feoffee or grantee created a use for him. If neither a consideration had been paid or reserved, nor a declaration made, the use would have resulted to the grantor,³ and he would have been *in* as of the old use. It was therefore determined, that if a man, *seised ex parte materna*, had made a feoffment, levied a fine, or suffered a recovery without having declared the use, and without consideration, the use would have resulted to him and his heirs on the part of his mother.⁴ This observation will apply to the conveyance by lease and release, as I shall *endeavour hereafter to explain. So if there had been two joint tenants, the one in fee, and the other for life, and they had levied a

⁸ Gilb. *Uses*, 43. Allen, 15, 16. Styles, 40. Bac. *Uses*, 43. See 22 Vin. 247, and cases collected in note to pl. 1. See post, whether an alien may be cestui que trust at this day.

⁹ Perk. s. 537. See Calthorp's case, Moor. 102. 1 Co. 176, b.

¹ Bro. *Feef. al.* *Uses*, 40. See *infra*, chap. 3, as to *trusts*.

² Same's case, 2 Roll. Ab. 791.

³ Perk. 533.

⁴ 1 Co. 100, b. Har. Co. Litt. 12 b. n. 2. 2 Salk. 591. 3 Lev. 406. 2 Roll. Ab. 780. 2 P. W. 139. See 22 Vin. 184, pl. 4, 5, and the cases collected in the notes. [So if he had expressly declared the use to himself and his heirs, the line of descent would not have been broken: for there was no difference whether the use, or any part of it, resulted by implication of law, or whether it was limited by express declaration to the party from whom the estate moved; *Abbot v. Burton*, Salk. 590. *Cholmondeley v. Clinton*, 2 Jac. & Walk. 1. 4 Bligh, N. S. 1. But now see stat. 3 & 4 Will. 4, c. 106, s. 3, (post, sec. vii. (4,) as to express limitations to the person or the heirs of the person making the conveyance.]

fine without having declared the use, it would have resulted to them according to their estates or interests in the land.⁵ In like manner, if A. seised in fee of an estate, had joined with B. in levying a fine, without a declaration of the use, it would have resulted to A. *only*, and his heirs.⁶

It should seem, that any pecuniary consideration, however trifling it might have been, or any rent reserved, however inconsiderable, would have been sufficient to raise the use to the feoffee, conuze, or recoveror.⁷

The above remarks applied only to conveyances *in fee*. The conveyance or creation of estates *tail*, for *life*, or *years*, (so far as related to the doctrine of uses,) depended upon different principles.⁸

In respect of grants of *incorporeal* property, it must be noticed, that if a man seised of a rent-charge in fee had made a conveyance of it, without having declared the use, and without any consideration, the grantee would have stood seised to the use of the grantor and his heirs.⁹ *But if the proprietor of lands had granted a rent-charge thereout unto a stranger, the law would [*62] not presume that such grant was intended for the grantor's use, though no use had been declared, nor consideration paid;¹ and upon a conveyance of a seignory or rent in tail, for life or for years, without declaration of the use, and without consideration, the grantee would have been seised to his own use.²

(4.) There should have been a sufficient substance or hereditament, out of which the use might have arisen. Thus, all local inheritances, as lands, houses, rents in esse, reversions, remainders, liberties, and franchises, might have been conveyed to uses. But it was different as to personal inheritances, such as annuities. So, it was said, that uses could not have been raised out of such things, *quae ipso usu consumuntur*, as commons, ways in gross, or authorities granted to a man and his heirs to hunt in a park, chase, or forest.³

X. I shall now examine the properties of the use.

⁵ Beckwith's case, 2 Co. 58, a.

⁶ Ibid.

⁷ Porter's case, 1 Co. 24, a. 2 Roll. Ab. 787, 788.

⁸ See ante, 28, et seq.

⁹ Perk. s. 530.

¹ Perk. s. 531.

² Ibid. 537.

³ Wm. Jones, 127.

(1.) It was descendible according to the rules of the common law respecting estates of inheritance;⁴ the courts [*63] of equity having, in this instance, adopted the maxim, *aequitas sequitur legem*. There might have been a *possessio fratris* of a use;⁵ though, indeed, Lord Bacon calls this a vulgar opinion;⁶ observing, that it meant nothing more than that the chancellor would consult with the rules of law, where the intention of the parties did not specially appear. The rule, however, was certainly established in Chancery.

So the use of lands held in borough-English would have descended to the youngest son, and that of gavel-kind to all the sons;⁷ and where *there was a [*64] custom of a manor, that the lands should descend to the eldest daughter, in default of sons, it was determined, that the use should descend in like manner.⁸

(2.) The use was devisable before the Statute of Wills.⁹ After the Conquest, a devise could not operate upon the lands; because, by the common law, the ceremony of livery of seisin was necessary to the transfer of them; and because it was contrary to the nature of a feud, that the feudatory should dispose of it by will. But the courts of equity, under the colour of allowing a devise of the use, did in effect permit the legal interest

⁴ 2 Roll. Ab. 780. If a man holds of the king before the Statute of Uses, and infeoffs others to his own use during his life, with remainder over in tail, remainder to his right heirs, and dies, the reversion descends to the heir, Bro. Livery, pl. 61. So if the ultimate limitation of the use was to the grantor's right heirs, although no express particular use was limited to him. Sir John Hussey's case, Bro. Nosme, pl. 1. 40 March. N. C. 87. Dyer, 133, pl. 6. [Fenwick v. Mitford, Moor. 284. Fearne's C. R. 51, 9th ed.] See post, ch. ii., s. 5, (2).

⁵ Year Book, 5 Ed. 4, 7, b. 1 Co. 88, a; 121, b. 4 Co. 22, a. Co. Litt. 19, b. Dy. 10, 11. Plowd. 58. [It may be noticed here, that under the new law of inheritance, as established by stat. 3 & 4 Will. 4, c. 106, there is no *possessio fratris*, that is, actual seisin of the elder son entitling the sister of the whole blood as next heir, in exclusion of the brother of the half-blood. By that act (s. 2), descent is to be traced from the last purchaser, (not from the person last actually seized), the rule of law prior to the statute having been *scissima facit stipitem*); so that, in those cases to which the rule of *possessio fratris* would have been applicable, the descent will have to be traced from the parent or more remote ancestor; and, consequently, the brother of the half-blood will take all lands descended from the parent, in preference to the sister of the whole blood, whether the brother of the whole blood had possession or not.]

⁶ Bac. Uses, 11.

⁷ 2 Roll. Ab. 780. 1 Co. 88, a.

⁸ 2 Roll. Ab. 780.

⁹ [32 Hen. 8, c. 1, before which lands were not devisable (ante, p. 46).]

in the lands to be devised.¹ An infant, however, was disabled from devising the use.²

(3.) As *cestui que use* might have devised, so he might have aliened or transferred the use;³ and by the statute 1 Rich. 3, he might have conveyed the legal estate. But it is observable, that in the case of a feme covert, a fine was necessary to pass her use.⁴

*(4.) But *cestui que use*, in respect to the legal ownership of the land, had neither *jus in re*, nor *ad rem*.⁵ Therefore, when in possession, he was considered merely as tenant by sufferance.⁶ He could not bring an action, avow, nor justify for damage *faisant* in his own name.⁷ When he made a lease pursuant to the statute 1 Rich. 3, the reversion still continued in the feoffees, who might have brought an action for waste, or have entered for a forfeiture.⁸ By force of the last-mentioned statute, he might have granted the herbage or corn, yet he could not have taken them for his own use.⁹ So his wife was not dowable of the use;¹ and the husband of feme **cestui que use* could not have [*65] his courtesy.³ *Cestui que use* did not forfeit his lands for treason,³ nor felony;⁴ and the use was not con-

¹ See Wright's Ten., 172, 174, ed. 1768. Year Book, 10 Hen. 7, 26. 27 Hen. 8, 7. 1 Co. 123, b. [But *cestui que use* could not devise the land itself by the equity of 1 Rich. 3 (ante, p. 46).]

² See Year Book, 21 Ed. 4, 24. 2 Roll. Ab. 779.

³ Bro. Feof. al. Uses, pl. 44. B. N. C. 75. Plowd. 350. Bac. Uses, 16.

⁴ Year Book, 7 Ed. 4, 14.

⁵ 1 Co. 121, b. W. Jones, 127. Bac. Uses, 5.

⁶ Year Book, 15 Hen. 7, 2. 4 Edw. 4, 8. Bro. Feof. al. Uses, 39. Plowd. 3, a. (Basset v. Manxell.) See 22 Vin. 286, pl. 2, 3, and the cases collected in the note to pl. 3. It should seem, from Hard. 491, that he was considered as tenant *at will*, and might therefore have taken a *release*; and this seems to be the true construction. See Litt. s. 462, 463. In Doe v. Pott, Doug. 710, the estate of a mortgagor was considered as a tenancy *at will*, and as such, capable of receiving a surrender. But cont. Bac. 24, Sem. [The case put by Littleton is that of a feoffment upon confidence to perform the last will of the feoffor. In such a case, according to Littleton himself (s. 463), it shall be intended *by the law*, that the feoffor ought presently to *occupy the land at the will* of his feoffees; and, according to Coke (271, b.), the land passeth by the will, and not by the feoffment. And with respect to the distinction between an *equity of redemption* and a *trust*, see post.]

⁷ Bro. Feof. al. Uses, pl. 39, 13, b.

⁸ Ibid. 26. Year Book, 5 Hen. 7, 5.

⁹ Bro. pl. 13. 5 Hen. 7, 2.

¹ Perk. s. 349.

² Perk. s. 463. 1 Co. 123, b.

³ [By the stat. 26 Hen. 8, c. 13 (passed shortly before the Statute of Uses), he forfeited them for high treason.]

⁴ Jenk. Cent. 190. Year Book, 5 Edw. 4, pl. 18.

sidered as assets in the hands of the heir, nor executor, to satisfy creditors.⁵

The several statutes before enumerated, and the preamble of the statute 27 Hen. 8, c. 10, point out other inconveniences attending the above principle, that *cestui que use* had no legal right nor title to the lands.

(5.) *Cestui que use*, indeed, might have been sworn upon an inquest;⁶ but this rule was established under particular circumstances; for, as Sir Edward Coke observes, at the time of making the statute 2 Hen. 5, c. 3, the greater part of the lands in the kingdom was held in use; an event occasioned by the unhappy controversy between the houses of York and Lancaster. Now, that statute was made to remedy a mischief, which happened from the sheriffs having frequently returned men of no understanding,⁷ and it therefore provides, that he should return proper men. The courts, therefore, for the advancement^{*} and expedition of justice, extended it [*67] (against the letter) to the *cestui que use* of lands, and not to his feoffees.

(6.) As to the feoffee, he was complete owner of the land at law. He performed the feudal duties;⁸ his wife had dower;⁹ and his estate was subject to wardship,¹ relief, &c. He had power of selling the lands, and forfeited them for treason or felony. In short, he might have brought actions, and have exercised every kind of ownership over, or in respect of, the lands.²

(7.) We have seen that the use did, in some instances, ensue the nature of the land; as in cases of descent, and where it had been declared, or resulted, to the grantor, or feoffor. But uses, as Bacon observes, differ in many instances from cases of possession. Thus, by the common law, warranty could not have bound the right of a use, as it would have done the right of possession.³ There was no necessity at common law for a consideration to

⁵ 1 Co. 121, b.

⁶ Co. Litt. 272, a.

⁷ See Year Book, 15 Hen. 7, 13.

⁸ See note 2, Butl. Co. Litt. 271, b.

⁹ Bro. Feof. al. Uses, pl. 10.

¹ [Thus the lord might have had a double wardship for the same land; one of the heir of the feoffee to uses, by the common law, and the other of the heir of the *cestui que use* by the stat. 4 Hen. 7. Co. Lit. 76, b.]

² Dy. 9, b. Jenk. 190, and the several cases before cited.

³ Bac. Uses, 12.

establish a deed, nor did notice constitute covin: but it has already been explained, how materially a conveyance to uses ⁴was affected by the want of a consideration, or by notice. In the case of possession, a rent out of land, and the land itself, cannot stand together: but it was otherwise in the case of a use. To the above differences mentioned by Bacon,⁵ I may add, that the word *heirs* was necessary at common law, to create an estate in fee-simple. But if a bargain and sale had been made before the Statute of Uses, the bargainer would have had an estate *in fee* in the use, without the word heirs;⁶ because the bargainer having paid a valuable consideration, the courts of equity would have directed the use according to the intention of the parties. So, if an estate had been limited at common law to a man, and to such a woman as he should afterwards marry, the man would have taken the whole;⁷ but the limitation of the use in the above manner would have been good.⁸ So, if there had been a feoffment in fee to the use of A. for years, with remainder to the use of the right heirs of J. S., this contingent remainder would have been good; for the feoffees remained tenants of the freehold.⁹

XI. Such, then, was the learning, and such the state of uses at the time, when it was deemed expedient to pass the statute 27 Hen. 8, c. 10, ¹⁰commonly called the Statute of Uses. They were attended, as the reader must have remarked, with considerable inconveniences, and serious mischiefs; and they had hitherto baffled the partial attacks of the legislature. It was now found expedient to apply some effectual remedy to the evil; and it is said, that Henry the Eighth, being displeased at the loss of wardships, and at other injuries done to him, complained to the judges of the defect of the law in that respect; and that they hinted to him, "that if the possession might be joined to the use, all would go well."¹¹ This advice probably laid the foundation of the Statute of Uses.¹²

⁴ See Bac. *Uses*, from 11 to 18.

⁵ 1 Co. 100, b. Co. Litt. 9, b.

⁶ Moor. 96, pl. 240.

⁷ 1 Co. 101, a. Dy. 190, pl. 17, 18.

⁸ 1 Co. 135, a.

⁹ 2 Leon. 17, 18.

¹⁰ The 10 Car. 1, sess. 2, c. 1, s. 1, in Ireland, is similar to the 27 Hen. 8, c. 10.

The statute recites, "Where by the common law of this realm, lands, tenements, and hereditaments be not devisable by testament, nor ought to be transferred from one to another, but by solemn livery and seisin, matter of record, writing sufficient made *bona fide* without covin or fraud ; yet, nevertheless, divers and sundry imaginations, subtle inventions, and practices have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries, and other assurances, craftily made to secret uses, intents, and trusts ; and also by wills and testaments sometime made by *nude parolz*, and words, [*70] sometime by signs and *tokens, and sometime by writing ; and for the most part made by such persons as be visited with sickness, in their extreme agonies and pains, or at such time as they have scantily had any good memory or remembrance ; at which times they being provoked by greedy and covetous persons, lying in wait about them, do many times dispose indiscretely and unadvisedly their lands and inheritances ; by reason whereof, and by occasion of which fraudulent feoffments, fines, recoveries, and other like assurances to uses, confidences, and trusts, divers and many heirs have been unjustly, at sundry times, disherited, the lords have lost their wards, marriages, reliefs, harriots, escheats, aids *pur fair fitz chivalier*, & *pur file marier*, and scantily any person can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions, or execution, for their rights, titles, and duties ; also men married have lost their tenancies by their courtesy, women their dowers ; manifest perjuries by trial of such secret wills, and uses, have been committed ; the king's highness hath lost the profits and advantages of the lands of persons attainted, and of the lands craftily put in feoffments to the uses of aliens born, and also the profits of waste for a year and a day of lands of felons attainted, and the lords their escheats thereof ; and many other inconveniences have happened, and daily do increase among the king's subjects, to their great trouble and inquietness, and to the utter subver-

sion of the ancient *common laws of this realm : [*71] for the extirpating and extinguishment of all such subtle practised feoffments, fines, recoveries, abuses and errors heretofore used and accustomed in this realm, to the subversion of the good and ancient laws of the same, and to the intent that the king's highness, or any other his subjects of this realm, shall not in anywise hereafter, by any means or inventions be deceived, damaged, or hurt by reason of such trusts, uses, or confidences, it may please the king's most royal majesty, that it may be enacted by his highness, by the assent of the lords spiritual and temporal, and the commons in this present parliament assembled, and by the authority of the same, in manner and form following, that is to say, That where any person or persons stand, or be seised, or at any time hereafter shall happen to be seised, of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the *use, confidence, or trust* of any *other* person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any manner of means whatsoever it be ; that in every such case all and every such person and persons, and bodies politic, that have, or hereafter shall have, any such use, confidence, or trust, in fee simple, fee tail, for term of life, or for years or otherwise, or any use, confidence, or trust in remainder, or reverter, shall from henceforth stand, and be seised, deemed, and *adjudged in lawful seisin, estate, [*72] and possession, of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders, and hereditaments, with their appurtenances, to all intents, constructions, and purposes in the law, of and in such-like estates, as they had or shall have in use, trust, or confidence, of or in the same ; and that the estate, title, right, and possession, that was in such person or persons, that were or hereafter shall be seised of any lands, tenements, or hereditaments, to the use, confidence, or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them, that have or here-

after shall have such use, confidence, or trust, after such quality, manner, form, and condition, as they had before in or to the use, confidence, or trust that was in them.

2. "That where divers and many persons be, or hereafter shall happen to be, jointly seised of and in any lands, tenements, rents, reversions, remainders, or other hereditaments, to the use, confidence, or trust, of any of them that be so jointly seised, that in every such case, those person or persons which have or hereafter shall have any such use, confidence, or trust, in any such lands, tenements, rents, reversions, remainders, or hereditaments, shall from henceforth have, and be deemed and adjudged to have only to him or them that have or hereafter shall have any such use, confidence, or trust, [*73] such estate, possession, and *seisin of and in the same lands, tenements, rents, reversions, remainders, and other hereditaments, in like nature, manner, form, condition, and course, as he or they had before in the use, confidence, or trust of the same lands, tenements, or hereditaments: saving and reserving to all and singular persons, and bodies politic, their heirs and successors, other than those person or persons which be seised, or hereafter shall be seised, of any lands, tenements, or hereditaments, to any use, confidence, or trust, all such right, title, entry, interest, possession, rents, and action, as they or any of them had or might have had before the making of this act.

3. "And also saving to all and singular those persons, and to their heirs, which be or hereafter shall be seised to any use, all such former right, title, entry, interest, possession, rents, customs, services, and actions, as they or any of them might have had to his or their own proper use, in or to any manors, lands, tenements, rents, or hereditaments, whereof they be, or hereafter shall be, seised to any other use, as if this present act had never been had nor made, any thing contained in this act to the contrary notwithstanding."²

² Upon this clause, see *Ferrers v. Fermor*, Cro. Jac. 648. 1 Vent. 195, 280. *Cecil's case*, 7 Co. 19, b. 20, a. 2 Roll. Rep. 245. 1 Mod. 107. [1st Salk. 241. 15 Vin. 363, pl. 4.] See as to a feoffment made by a lord to his copyholder to the use of others, *Iasd's case cited* 7 Co. 39.

*4. "And where also divers persons stand and [*74]
be seised of and in any lands, tenements, or hereditaments, in fee simple or otherwise, to the use and intent that some other person or persons shall have and perceive yearly to them, and to his or their heirs, one annual rent of 10*l.* or more or less, out of the same lands and tenements, and some other person one other annual rent to him and his assigns, for term of life or years, or for some other special time, according to such intent and use as hath been heretofore declared, limited, and made thereof:

5. "Be it enacted therefore by the authority aforesaid, That in every such case, the same persons, their heirs and assigns, that have such use and interest, to have and perceive any such annual rents, out of any lands, tenements, or hereditaments, that they and every of them, their heirs and assigns, be adjudged and deemed to be in possession and seisin of the same rent, of and in such like estate as they had in the title, interest, or use of the said rent or profit, and as if a sufficient grant, or other lawful conveyance, had been made and executed to them, by such as were or shall be seised,³ to the use or intent of any such rent to be had, made, or paid, according to the very trust and intent thereof; and that all and every such person and persons as have or hereafter shall have any title, use, and *interest, in [*75] or to any such rent or profit, shall lawfully distrein for non-payment of the said rent, and in their own names make avowries, or by their bailiffs or servants make conisances and justifications, and have all other suits, entries, and remedies, for such rents,⁴ as if the same rents had been actually and really granted to them with sufficient clauses of distress, re-entry, or otherwise, according to such conditions, pains, or other things, limited and appointed upon the trust and intent for payment or surety of such rent.

6. "And be it further enacted, by the authority aforesaid, That, whereas divers persons have purchased, or have estate made and conveyed of and in divers lands,

³ Dyer, 362, b. pl. 21.

⁴ See upon this head, *Bascawin and Herle v. Cooke*, 1 Mod. 223.

tenements, and hereditaments, unto them and their wives, and to the heirs of the husband, or to the husband and to the wife, and to the heirs of their two bodies begotten, or to the heirs of one of their bodies begotten, or to the husband and to the wife for the term of their lives, or for term of life of the said wife; (2.) or where any such estate or purchase of any lands, tenements, or hereditaments, hath been, or hereafter shall be made to any husband and to his wife in manner and form expressed, or to any other person or persons, and to their heirs and assigns, to the use and behoof of the said husband and wife, or to the use of the wife as is before re-
[*76] hearsed, for the jointer of the wife; (3.) that *then, in every such case, every woman, married, having such jointer made, or hereafter to be made, shall not claim, nor have title to any dower of the residue of the lands, tenements, or hereditaments, that at any time were her said husband's, by whom she hath any such jointer, nor shall demand or claim her dower of and against them that have the lands and inheritances of her said husband; (4.) but if she have no such jointer, then she shall be admitted and enabled to pursue, have and demand her dower by writ of dower, after the due course and order of the common laws of this realm; this act, or any law or provision made to the contrary thereof, notwithstanding.

7. "Provided alway, That, if any such woman be lawfully expulsed or evicted from her said jointer, or from any part thereof, without any fraud or covin, by lawful entry, action, or by discontinuance of her husband; then every such woman shall be endowed of as much of the residue of her husband's tenements or hereditaments, whereof she was before dowable, as the same lands and tenements, so evicted and expulsed, shall amount or extend unto.

8. "Provided also, That this act, nor any thing therein contained or expressed, extend, or be in any wise hurtful or prejudicial to any woman or women heretofore being married, of, for, or concerning such right, title, use, interest, or *possession, as they or any of [*77] them have claim, or pretend to have for her or

their jointer or dower of, in, or to any manors, lands, tenements, or other hereditaments of any of their late husbands, being now dead or deceased, any thing contained in this act to the contrary notwithstanding.

9. "Provided also, That if any wife have, or hereafter shall have any manors, lands, tenements, or hereditaments, unto her given and assured, after marriage, for term of her life, or otherwise in jointer, except the same assurance be to her made by act of Parliament, and the said wife after that fortune to outlive her said husband, in whose time said jointer was made or assured unto her, that then the same wife so overliving, shall and may at her liberty after the death of her said husband, refuse to have and take the lands and tenements so to her given, appointed, or assured during the coverture, for term of her life or otherwise in jointer, except the same assurance be to her made by act of Parliament, as is aforesaid; (2.) and, thereupon to have, ask, demand, and take her dower by writ of dower or otherwise, according to the common law, of and in all such lands, tenements, and hereditaments as her husband was, and stood seised of any state of inheritance at any time during the coverture, any thing contained in this act to the contrary thereof notwithstanding.

10. "Provided also, That this present act, or anything herein contained, extend, nor be at any time hereafter interpreted, expounded, or taken, to extinct, release, discharge, or suspend any statute, recognizance, or other bond by the execution of any estate of or in any lands, tenements, or hereditaments, by the authority of this act, to any person or persons, or bodies politic; any thing contained in this act to the contrary thereof notwithstanding.

11. "And forasmuch as great ambiguities and doubts may arise of the validity, and invalidity of wills heretofore made of any lands, tenements, and hereditaments, to the great trouble of the king's subjects: (2.) the king's most royal majesty, minding the tranquility and rest of his loving subjects, of his most excellent and accustomed goodness, is pleased and contented that it be enacted by the authority of this present Parliament, that all manner

true and just wills and testaments heretofore made by any person or persons deceased, or that shall decease before the first day of May that shall be in the year of our Lord God 1536, of any lands, tenements, or other hereditaments, shall be taken and accepted good and effectual in the law, after such fashion, manner, and form as they were commonly taken and used at any time within forty years next afore the making of this act; any thing contained in this act, or in the preamble thereof, or any opinion of the common law to the contrary thereof, notwithstanding.

*12. "Provided always, That the king's highness shall not have, demand, or take any advantage or profit for or by occasion of the executing of any estate, only by authority of this act, to any person or persons, or bodies politic, which now have, or on this side of the first day of May which will be in the year of our Lord God 1536, shall have any use or uses, trusts or confidences in any manors, lands, tenements, or hereditaments holden of the king's highness, by reason of premier seisin, livery, ouster le main, fine for alienation, relief, or harriot; (2.) but that fines for alienations, reliefs and harriots, shall be paid to the king's highness, and also liveries and ouster les mains shall be used for uses, trusts, and confidences to be made and executed in possession by authority of this act, after and from the said first day of May, of lands and tenements, and other hereditaments holden of the king in such-like manner and form, to all intents, constructions, and purposes, as hath heretofore been used or accustomed by the order of the laws of this realm.

13. "Provided also, That no other person or persons, or bodies politic, of whom any lands, tenements, or hereditaments be, or hereafter shall be holden mediate or immediate, shall in any wise demand or take any fine, relief or harriot, for or by occasion of the executing of any estate by the authority of this act, to any person or persons, or bodies politic, before the said first day of May which will be in the year 1536.

*14. "And be it enacted by the authority aforesaid, That all and singular person and

persons, and bodies politic, which at any time on this side the said first day of May which shall be in the year of our Lord God 1536, shall have any estate unto them executed, of and in any lands, tenements, or hereditaments by the authority of this act, shall and may have and take the same or like advantage, benefit, voucher, aid, prayer, remedy, commodity, and profit by action, entry, condition, or otherwise, to all intents, constructions, and purposes, as the person or persons seised to their use of or in any such lands, tenements, or hereditaments, so executed, had, should, might, or ought to have had at the time of the execution of the estate thereof, by the authority of this act, against any other person or persons, of or for any waste, disseisin, trespass, condition broken, or any other offence, cause, or thing concerning or touching the said lands or tenements so executed by authority of this act.

15. "Provided also, and be it further enacted by the authority aforesaid, That actions now depending against any person or persons seised of or in any lands, tenements, or hereditaments, to any use, trust, or confidence, shall not abate, ne be discharged for or by reason of executing of any estate thereof, by authority of this act, before the said first day of May which shall be in the year of our Lord God 1536, any thing contained in this act to the contrary notwithstanding.

*16. "Provided also, That this act, nor any [*81] thing therein contained, shall not be prejudicial to the king's highness, for wardships of heirs now being within age, nor for liveries, or for ouster le mains, to be sued by any person or persons now being within age, or of full age, of any lands or tenements unto the same heir or heirs, now already descended; anything in this act contained to the contrary notwithstanding.

17. "Provided also, and be it enacted by the authority aforesaid, That all and singular recognizances heretofore knowledged, taken or made to the king's use, for or concerning any recoveries of any lands, tenements, or hereditaments heretofore sued or had, by writ or writs of entry, upon disseisin in le post, shall from henceforth be

utterly void and of none effect, to all intents, constructions, and purposes.

18. "Provided also, that this act, nor anything therein contained, be in any wise prejudicial or hurtful to any person or persons born in Wales, or the marches of the same, which shall have any estate to them executed by authority of this act, in any lands, tenements, or other hereditaments within this realm, whereof any other person or persons now stand or be seised to the use of any such person or persons born in Wales, or the marches of the same, but that the same person or persons born in Wales, or the marches of the same, shall, or may lawfully have, retain, and keep the *same lands, [*82] tenements, or other hereditaments, whereof estate shall be so unto them executed by the authority of this act, according to the tenor of the same; anything in this act contained, or any other act or provision heretofore had or made, to the contrary notwithstanding."

[*83]

*CHAPTER II.

OF USES SINCE THE STATUTE 27 HEN. 8, c. 10.

WHATEVER might have been the intention of the legislature, the statute of 27 Hen. 8, c. 10, certainly did not abolish the practice of conveying to uses: it has merely destroyed the intervening estate of the feoffees, or grantees; and thereby converted the equitable into a legal estate.

Some have thought,⁶ that the legislature meant, that lands should not pass subsequently to the statute by way of use, but only by solemn livery; and therefore they held, that these words of the statute, "Where any per-

⁶ 1 Co. 125, a. b.

son or persons stand, or be seised, or at any time hereafter shall happen to be seised," are not evidence, that the makers of the act expected that uses would be continued afterwards; but that those words were inserted to provide for a case which possibly might occur: as, supposing a feoffee to uses had been disseised before the act, and the disseisin had continued until the act passed; at the time of the act, he was not seised to the use of any person; but he might afterwards, by his entry, re-vest the uses, and then being seised to the uses after the act, *the use would have been executed in the [*84] cestui que use. But this appears to me to be a refined construction upon the words of the statute. Can it be supposed that the framers of an act, which, as Sir Francis Bacon has observed,⁶ contains the wisest and fittest ordinances, and the most foreseeing and circumspect savings and provisoies, could not foretell that there might have been future conveyances to uses? Were they unacquainted with the doctrine of resulting uses? And if they had intended that lands should not pass by future conveyances, operating by way of use, and that resulting uses should not be executed by the statute, can it be supposed that they would not have expressed themselves clearly upon these points? To me it appears evident, that, although the statute, by incorporating the use and possession, has virtually extinguished the separate existence of the use, it was not in the contemplation of the legislature to prevent conveyances to uses. This opinion is supported by the statute of inrolments, which makes an additional ceremony necessary to the transfer of the use, and by the twelfth section of the statute of uses, which speaks of uses *to be* made and executed in possession, after a particular period: and it is sanctioned by Sir Francis Bacon,⁷ who, with respect to the case of the disseisin before the statute, observes, that the regress of the feoffees, after the statute, was excluded by the two savings; *for the first saving respects the [*85] right of all persons, except the feoffees; and the second saves the right of the feoffees to their own use;

⁶ Bac. Uses, 30.

⁷ Bac. Uses, 40.

so that, between both, the right of the feoffees to the use of another, was shut out.⁸

II. There are several circumstances necessary to the raising and execution of uses by virtue of the statute.

(1.) As to the person seised to the use.

The statute 27 Hen. 8 did not, nor indeed could, alter the nature of the use.⁹ It would be a contradiction in terms to say, that an equitable interest, not within the statute 1 Rich. 3, was a *use* within the statute 27 Hen. 8: and it must therefore follow, that a person not capable before the statute 27 Hen. 8 of being seised to a use, cannot be a grantee to uses after it. I have already mentioned the several persons incapacitated to stand seised to uses;¹ and it is only necessary to remark in this place, that if an alien be enfeoffed to uses, the statute executes the use until office found: but upon office being [*86] found, the use is destroyed by relation.² It is the same, *if a person, having committed treason, is made grantee to uses, and is afterwards attainted.³

But the statute 27 Hen. 8 executes *trusts* and *confidences*, as well as *uses*; and it appears obvious to me, that under these words the legislature intended that every beneficial interest in the shape of a trust, for the performance of which the subpoena would lie against the trustee, and where the old use or legal estate was not, either by express declaration or necessary construction, vested in him, should be executed by the statute, notwithstanding the trustee, on account of his limited or inferior estate, or by reason of tenure, could not stand seised to a use before the statute. By attending to this distinction, I apprehend, that the apparent contradictions in the books, upon the subject under consideration, may be reconciled.

I have already stated the grounds which have occurred to me in support of the conclusion, that neither tenant

⁸ Bac. *Uses*, 51.

⁹ "The statute 27 Hen. 8, doth only execute old uses, but doth not create any new uses." Per Coke, in *Cowper v. Frankline*, 3 Buls. 185.

¹ *Ante*, 54, & seq.

² Bac. 59. *King v. Boys, Dyer*, 283, b. pl. 31. [But if the feoffee or releases to uses disclaim, the disclaimer comes too late to prevent the execution of the use. 7 Bac. Abr. 87.]

³ Bac. 58, 59. *Throgmorton's case*, cited *Moor*, 390, 391.

for life nor for years could stand seised to a use before the statute ;⁴ but it is clear that the statute executes the trust declared upon the seisin of a grantee for life ;⁵ and so it would have executed the trust declared upon a term for years if the statute had used the word “*pos-* [*87] *seised*,” as well as “*seised* ;” for the reason assigned by the books, that the trust is not executed in the latter case, is, that the word “*possessed*” is omitted in the statute,⁶ and not because a termor for years could not stand seised to a use.

To pursue this distinction ; if the statute, in describing the persons standing seised to a use, had used the words “body politic,” I apprehend that there would have been no ground to contend, that the trust declared upon the estate of a *corporation* would not have been executed by the statute ; for the reason that a corporation could not stand seised to a use was, that the subpoena did not issue against it to compel the performance of the trust,⁷ a reason which has ceased to operate.⁸

The same construction, I conceive, will apply to a trust declared upon the estate of a tenant in tail ; for although Coke, Bulstrode, and others report,⁹ that in the case of *Cooper v. Franklyn*, it was determined that he could not stand seised to “a use, either by express [*88] declaration or by implication ; yet, admitting this construction in the fullest extent, the question will still be, whether the words of the statute do not include trusts declared upon, or limited to arise out of, the seisin of a tenant in tail ? The statute mentions the word “*trust*,” as well as “*use* ;” and there is no doubt that the word “*seised*,” will extend to, and comprise, every freehold seisin ; and there is nothing in the statute which saves the right of a tenant in tail.

⁴ Vide ante, 29, & seq.

⁵ Shep. T. 507. 2 Leon. 16. Vaugh. 49. Crawley's case, Cro. Eliz. 721. Dy. 186, a. See Williams v. Jekyll, 2 Ves. 682.

⁶ See Jenk. 195.

⁷ See Bac. 57.

⁸ See Jenk. 195.

⁹ 2 Vern. 412. 1 Ves. 467, 468. [Attorney-General v. Foundling Hospital, 2 Ves. jun. 46. Dummer v. Corporation of Chippenham, 14 Ves. 252. Ex parte Greenhouse, 1 Mad. 92. Attorney-General v. Lauderfield, 3 Swanst. 417, note.]

¹ Co. Litt. 19, b. 2 Co. 78, a. 3 Buls. 184. Cro. Jac. 400. Moor, 848. 1 Roll. Rep. 384. 2 Roll. Ab. 780. Shep. T. 509. Jenk. 195. Vide contra, Godb. 269. Bacon, 57, 58. Dyer, 311, b. [Win. Abr. Uses, C.]

The case of *Cooper v. Franklyn* is in fact rightly determined. The use in that case could not have been executed by the statute; and therefore it became necessary to ascertain, whether tenant in tail could, before the statute, stand seised to a use. It was thus: John Walter enfeoffed Thomas, his son, to hold to him and the heirs of his body, to the use of him and his heirs for ever. Now, the use being limited to the feoffee himself, the statute could not execute it; as the statute executes the use [only] in those cases where it is limited to third persons, as I shall show in the next section. The question, therefore, whether a trust declared upon a seisin conveyed to a person in tail, in trust for another person, and his heirs, be not executed by the statute, did not arise in, and certainly was not determined by, the case of *Cooper v. Franklyn*.³

[*89] *(2.) As to cestui que use.
 I must observe, that all persons who were capable of receiving or enforcing the use before the statute, can now take under the limitation of a use;⁴ and the statute on the part of cestui que use particularly couples the words *body politic* with that of person.

The statute says, "That where any person or persons stand or be seised, &c., to the use, confidence, or trust of any other person or persons, &c.:" and therefore if a use be limited to a feoffee, conuzee, recoveror, or releasee, such use, generally speaking, is not executed by the statute, but the feoffee, &c. is in by the common law.⁵ In this case, notwithstanding the grantee is in by the common law, yet after the declaration of the use to him, he has not only a seisin, but a use; although not the use which the statute requires; and therefore that seisin, which before the limitation of the use to himself, was open to serve uses declared to a third person, is by the

³ In Brent's case, 2 Leon. 16. Manwood observes, that "at this day, a gift in tail or a lease for life, is made to another's use; yet, notwithstanding that the law doth create a tenure upon the lease or gift, yet the use expressed shall be good."

⁴ See ante, Ch. 1, S. ix. (2.)

⁵ Samme's case, 13 Co. 56. Altham v. Anglesey, Gilb. Rep. 16, 17. Long v. Buckeridge, 1 Stra. 106. Ba. Uses, 43, 62. Gwam v. Roe, 1 Salk. 90. [And see Doe v. Prestwidge, 4 Mau. & Sel. 182, 183. Doe v. Passingham, 6 Barn. & Or. 305.]

limitation filled up, and will not admit of any other use being limited on it; upon the principle, that a [*90] *use cannot be limited upon a use. In Tippins [*90] v. Cosins (Comb. 313), Hale observes, "Whether feoffees take by the common law, or by the statute, yet where the use is once disposed of to them and their heirs (whether the statute executes it or not), there cannot be a use upon an use, nor a trust upon such an use to be executed by the statute."⁵

The ground of this construction is, that before the statute, real property was divided into use and possession; but there was no third kind of interest then known. Consequently, when the *seisin was transferred [*91] to A. B. and his heirs, and it was added, to the use of him, and his heirs, he had both the legal and beneficial interest; and there is nothing in the statute to alter the nature of his estate.

In a case,⁶ where M. gave his land to E. R. and his wife, *habendum* to the said *baron and feme*, to the use of them, and the heirs of their two bodies, and for want of such issue, remainder to E. M. and his heirs; the question was, whether the baron and feme had an estate tail, or an estate for their lives only? It was argued, that the estate, out of which the use should arise, was an estate for their lives, and the use could not make the estate larger than the limitation of the seisin: but the judges conceived that there was a difference, where an

⁵ "Possession is transferred to the use by the statute; and therefore an use cannot be expressed upon a use, as feoffment to J. S. to his own use, and that he shall be seized to the use of R. H.; this is void to R. H. because the use and possession were to J. S. before." Moor, 46, pl. 138.

"A. enfeoffed B. and C. (his two sons) to the use of himself for life, and after to the use of them and their heirs, *ad ultimam voluntatem suam perimplendam*, and afterwards devised it to D. *Per Gaudy*, D. shall not have the land, for a use cannot be limited to a use. So that when he limits it to the use of his two sons and their heirs, he cannot afterwards limit it to the use of his last will; but the words *ad ultimam*, &c., are void words, as to the limiting any uses thereby. And to that opinion *Clench*, J., agreed; but *Fenner*, J., doubted. *Girland v. Sharp*, Cro. Eliz. 382, pl. 2."

"If one without any consideration enfeoff another by deed, habend. to the feoffee and his heirs, to his own use, and the feoffee suffer the feoffor to occupy the lands several years; yet the right is in the feoffee; because express use is contained in the deed." And. 37, pl. 95. Anon. See post, chap. ii., s. 5, (8.) [See also *Attorney-General v. Scott*, Ca. tem. Tal. 139. *Lady Wheatsone v. Bury*, 2 P. Wms. 146. *Doe v. Passingham*, 8 Barn. & Cress. 305.]

⁶ *Jenkins v. Young*, Cro. Car. 230, 244. See *Young v. Dymock*, 186, s, in notis.

estate was limited to one, and the use to a stranger, for there the use should not be more than the estate, out of which it was derived; but not when the limitation was to two, habendum to them, to the use of [them and] the heirs of their bodies; for this was *no limitation of the use*, nor was it executed by the statute; but it was a limitation of the *estate* to them and the heirs of their bodies *by the course of the common law*.

So if an estate be conveyed to A. B., and C., and their heirs, "To hold unto the said A., B., and C., their heirs and assigns, to the use of the *said A., B., and C., for and during the natural lives of them, and the life and lives of the survivor and survivors of them;" it should seem, that this is not a statute-use; but that A., B., and C. will take an estate of freehold for their lives by the common law.⁷

Sir Francis Bacon⁸ observes, "That the statute ought to be expounded, that where the party seised to the use and the *cestui que use* is one person, he never taketh by the statute, except there be a direct *impossibility* or *impertinency* for the use to take effect by the common law." When a grantee to uses takes a partial or limited estate under the limitation, and the remaining portion of the use is declared to a third person, the grantee may, in some cases, acquire a legal estate by the statute; and I apprehend, that the ground of this construction is, that the words of the statute being satisfied by the limitation of part of the use to a third person, courts of law will give effect to the whole limitation in such a way as to make it conformable either to established rules of law, or to the intention of the parties.

First: Where the use is limited to the feoffee *in tail* out of his own seisin in fee, and the remainder over to another: as if a feoffment be made to *J. S. in fee, to the use of himself in tail, with remainder to D. in fee; or if J. S. covenant to stand seised to the use of himself in tail, with remainder to the use of his wife in fee; in both these cases the estates tail limited

⁷ Bac. *Uses*, 63. See an excellent opinion upon this case by the late Mr. Booth, published in the *Collection of Cases and Opinions*, vol. ii. 281.

⁸ Bac. *Uses*, 63.

to J. S. are executed by the statute.⁹ But I apprehend, that the construction would have been different in the case of the feoffment, if the whole seisin had not been limited to the feoffee; thus, if the feoffment had been made to J. S. *generally, habendum* to and to the use of *himself in tail*, with remainder to the use of A. B. in fee. Now, in this case, J. S. has not a seisin to serve the use to A. B.; and therefore, if the remainder to him can take effect at all, it must take effect by the livery made to J. S. in the course of possession by the common law.¹ So too the construction is different, if the use upon the feoffment be in the first instance limited to the feoffer or a stranger for life, or in tail, with the remainder to the feoffee in fee;² and it should also seem, that if the first use be limited to the feoffee *for life*, or *for years*, with the remainder over in fee, he will take by the common law.³

Secondly: Where the whole seisin in fee is conveyed to the feoffee, and many estates in the *use are [*94] carved out of such seisin, one of which estates the feoffee takes; as if A. be enfeoffed to the use of C. D. for life, remainder to the use of himself for life, remainder to the use of J. N. in fee; the use limited to the feoffee will be executed by the statute; for the law will not admit fractions of estates.⁴

Thirdly: If J. S. be enfeoffed to the use of himself and a stranger: or if a feoffment be made to a bishop and *his heirs*, to the use of himself and *his successors*; the use is executed by the statute in both cases.⁵

Here I cannot with propriety omit the advice of Lord Bacon.⁶ "Now let me advise you of this, that it is not a matter of subtily or conceit to take the law right, when a man cometh in by the law in course of possession, and where he cometh in by the statute in course of possession; but it is material for the deciding of many causes

⁹ Bac. Uses, 63. 13 Co. 56.

¹ See 2 Roll. Ab. 68. Litt. sec. 60. If a feoffment had been made to A. for years, remainder to B. in fee, and the livery had been made to A., this would have passed the fee to B. in course of possession at common law.

² Co. Litt. 22, b. Bac. Uses, 64.

³ Bac. Uses, 63, and see Booth's Op. cited ante.

⁴ Bac. Uses, 64.

⁵ Ibid. 64.

⁶ Ibid. 65.

and questions, as for warranties, actions, conditions, waivers, suspicions, and divers other provisoes."

(3.) The statute requires that there should be a use *in esse* in possession, reversion, or remainder. That use may be either expressed or implied.

First: *Of express uses.* The statute mentions the words *use, trust, and confidence.* If lands be *con-
[*95]veyed to A. and his heirs in trust for B. and his heirs, or in confidence that he and they shall take the profits, the legal estate is vested in B. by virtue of the statute: and it is to be observed, that upon the execution of every use or trust by the statute, *cestui que use shall have the legal estate, after such quality, manner, form, and condition as he had before in or to the use, confidence, or trust that was in him.*⁷

Besides the words mentioned by the statute, the word *intent* will raise a use.⁸ Thus a man made a feoffment in fee, *sub conditione, ea intentione*, that his wife should have the land for her life, with remainder to his younger son in fee; the feoffor died, and also the feoffee, without having made any estate. The heir of the feoffor entered as for a condition broken; but it was resolved that this was no condition, but an estate executed presently by the statute, according to the *intent* of the parties.⁹ So if it appears, that the parties intended to create a use, though that intention be not expressed by the word *intent*, or by [*96] any other of an express fiduciary import, yet *the use will be executed by the statute. Therefore in a case,¹⁰ where A. in 4 Hen. 7, made a feoffment in fee, and accompanied with a deed of defeazance or declaration, which gave the feoffor and his heirs a power of entry after quiet enjoyment by the feoffees for 100 years; it was held by the judges, after the term had elapsed, that the lands were vested in the heir of the feoffor by the statute 27 Hen. 8; for that it appeared to be the *intent*

⁷ *Eure v. Howard*, Prec. Cha. 345. *Broughton v. Langley*, 2 Salk. 679, [and Lord Raym. Rep. 873]. Right ex dem. *Phillipps v. Smith*, 12 East, 455. A trust by will *to pay the rents to A., or to permit him to receive the same, was considered as a use executed.* Doo dem. *Leicester v. Bigge*, 2 Taunt. 109.

⁸ See upon these words, Bac. *Uses*, 47.

⁹ *Hummerston's case*, *Dyer*, 168, a. in *notis*. *Betnam v. Bateson*, *ibid.* and 4 *Leon.* 22. 5 *Vin.* 44, pl. 5, and notes.

¹⁰ *Anon.* 4 *Leon.* 2, pl. 3.

¹¹ *Boydell v. Walthall, Moore*, 722.

of the feoffor, that he should have the lands after the 100 years possession by the feoffees. The *intent* was the *use* of the feoffment, which arose out of the possession of the feoffees, and was executed by the statute of uses.³

It has been said, that if A. (the grantor) be entitled to a remedy at common law by an action of covenant in order to compel B. (the grantee) to execute estates, there, as no subpoena will lie for A. as *cestui que use* against B., so no use can be executed in A. by the statute.⁴

Secondly: *Of implied or resulting uses.*⁵ (a) As the statute did not expressly abolish all future *limitations of, and estates created by, uses, there was [*97] actually no avoiding the execution of uses, limited or occasioned by conveyances made subsequently to the act. When a feoffment was made without consideration and declaration of the use, what construction was to be adopted? We have seen, that, before the act, the chancery, which judged according to the intention of the parties, would have construed the *possession* to be in the feoffee, and the *use* in the feoffor. Does the statute destroy this construction? On the contrary, the case appears to come directly within the meaning of it; the words being, *that where any person, &c. stands seised to the use of another, by reason of any feoffment, &c. or by any manner of means whatsoever, then, &c.* In this case, the feoffee stands seised to the use of another, viz. the feoffor, by an admitted construction before the act. The act certainly did not intend to alter the manner of raising uses; nor did it mean to make any thing pass by a conveyance, which did not pass before; that is to say, it did not mean, that the *land* and *use* should now pass in a case, in which the *land* only passed before the statute.⁶

³ See Callard v. Callard, Cro. Eliz. 344. 2 Roll. Ab. 788. Moore, 687.

⁴ See Wingfield v. Littleton, Dyer, 162, a. See post, 6th subdiv. of this sec.

⁵ [By the 3 & 4 Will. 4, c. 74, s. 22, (the act for the abolition of fines and recoveries), a resulting use or trust is declared to be such an estate as to qualify the person holding it to be protector of the settlement.]

⁶ Vide 2 Raym. 800. Co. Litt. 22, b. Jenk. Cent. 253.

(a) Implied and resulting trusts are excepted from the provisions of the article of the New York revised statutes. Astor v. L'Amourenx, 4 Sandf. Sup. Ct. (N. Y.) 524. These provisions exclude all express trusts, except those enumerated. Yates v. Yates, 9 Barb. Sup. Ct. (N. Y.) 324.

It may therefore be considered as a general rule, that if a feoffment be made, a fine levied, or recovery suffered without consideration and declaration of the use, the use will result to the feoffor, &c. and be executed in him by the statute.⁷(a)

[*98] *Indeed it is said,⁸ that if a feoffment be pleaded, the use need not be averred to the feoffee; because if nothing appear to the contrary, the use must be intended to be in him; and that such was the form of pleading *before* the statute. If this be the course of pleading, it may be asked, what utility can arise from the doctrine of resulting uses? To which it may be answered, that although the rules of pleading do not require an averment of the use in favour of the feoffee, yet it may be averred to be in the feoffor; and that the want of a consideration and declaration of the use is a sufficient circumstance to prove, that it was intended for him.⁹

[*99] *I must here observe, that uses generally result according to the estate and interest of the person or persons making the conveyance;¹ and he or they, in that case, claim under the old use. However, when a

⁷ Armstrong *v.* Wolsey, 2 Wils. 19. Doug. 26. Beckwith's case, 2 Co. 56, 58, b. Dyer, 146, b. 2 Roll. Ab. 781. Read *v.* Errington, Cro. Eliz. 321. 22 Vin. 214, pl. 1, and notes.

[So if in a devise there be a limitation which is wholly void, the use results to the heir of the testator, whether the limitation is in fee or for a partial interest only. Lomas *v.* Wright, 2 Myl. & K., 778. See also Tregownell *v.* Sydenham, 3 Dow. 194.]

⁸ Shortridge *v.* Lamplugh, 2 Salk. 678. 7 Mod. 71. 1 Stra. 107.

⁹ Anglesea *v.* Altham, Holt Rep. 737. 1 Stra. 107. [Gilb. Rep. 16.] In the margin of Salkeld's Reports, which belonged to the late Serjeant Hill, opposite to the case of Shortridge *v.* Lamplugh, is the following MS. note, which, although not in the hand-writing of, is evidently dictated by, the learned Serjeant.

"*Contra*, Vin. Uses (Y. a.) pl. 1, and the notes, pl. 24; but most of the cases there cited before the statute; and, therefore, Q. if since the statute it is not necessary, in pleading a feoffment or release, for the feoffor or releasor to make an averment, that it was to his use? and it seems, that the want of a consideration would be evidence of the truth of such averment, if traversed; but if the deed purports a valuable consideration, the feoffor or releasor cannot be admitted to take such averment. Dyer, 169, pl. 21, S. P. 9; Co. 11, b., accordingly as to a recovery, and Salk. 676, pl. 2, as to a fine a feoffment."

¹ See ante, Ch. I. S. ix. (3). Roe *v.* Popham, Doug. 24, and 22 Vin. 215, pl. 2, and notes, and pl. 6, 7.

(a) Where land is conveyed for a consideration, to be after ascertained by the price for which grantee may sell it, a trust results to grantor. Prevost *v.* Gratz, 1 P. C. C. (Penns.) 366. See Brooks *v.* Fowle, 14 N. Hamp. 248. Where conveyance is illegal, a trust results for grantor. Lemmond *v.* Peoples, 6 Ired. Eq. (N. Car.) 137.

tenant in tail suffers a recovery without consideration or declaration of the use,³ the use (notwithstanding the aspect of some of the cases⁴) will result to the *recoveror* in *fee*:⁵ for as the recoveror or defendant acquires a seisin in *fee*, the use, if it result at all, must result according to the extent of that seisin; the words of the act being, that the *estate, title, right, and possession* of the person seised to the *use* shall be transferred to the *cestui que use*; and in the very distinguished argument of the Chief Justice *Lee*, in delivering the opinion of the court in the case of *Martin v. Strahan*,⁶ is the following passage: "It is the use of the *fee-simple*⁷ that passes [*100] to the *recoveror from *tenant in tail*, and which

³ [Or with a declaration of uses that are void. *Tanner v. Radford*, 6 Sim. 21. Doe dem. *Baverstock v. Rolfe*. 8 Adol. & El. 650-663.]

⁴ See *Argol v. Cheney*, Latch. 82. *Waker v. Snow*, Palm. 259.

⁵ 9 Co. 8, b. Gilb. *Uses*, 61. *Nightingale v. Ferrers*, 3 P. W. 208. [Bac. Abr. *Uses* (Z).] Gilb. *Uses*, Sugden's ed. 110, 119. 1 Cru. Dig. 451. In *Tanner v. Radford*, Sir Edward Sugden, *arguendo* denied that the case of *Nightingale v. Ferrers* was an authority for the position that where a tenant in tail suffers a common recovery, without any declaration of uses, the resulting use is to him in *fee simple*, the only question in that case having been, whether the uses were well raised by the marriage articles.]

⁶ 5 Term. Rep. 177, 110, in note.

⁷ [That is, the "absolute, unfettered, pure *fee simple*:" and the reason, to be collected from the judgment itself, is, that what is called an *estate tail* is still, in the eye of the law, a *fee conditional*, as before the statute *de donis*; and the *potestas alienandi* which that statute took away from the tenant in *fee-simple conditional*, thereby converting his *estate* into the *estate tail*, was restored by the common recovery, which the law took as a conveyance excepted out of the statute, as if the tenant in tail were seised in *fee*. And the recovery, therefore, did not break the line of descent: so that when the *estate tail* had descended, *ex parte maternâ*, to the party suffering the recovery, the *use* would also have resulted to him, *ex parte maternâ*: see post. It is to be observed, however, that the introduction of the common recovery did more than merely restore the *potestas alienandi* of the tenant in tail; since by that assurance he could alien even before issue born, which he could not have done previously to the statute *de donis*. This enlarged power of alienation, given in fact originally to the tenant in tail by the judges, in defiance of a statute, the object of which "for the mischief which were introduced in the commonwealth thereby" (1 Co. Litt. 31) they were determined to defeat, has now been expressly confirmed by the legislature, at the same time that more simple modes of assurance, viz. common assurances enrolled in Chancery, have been substituted for the complicated fictions of the fine and the recovery. See 3 & 4 W. 4, c. 74. It may be observed that a disposition, under this act, by tenant in tail having the remainder or reversion in *fee*, either immediate at the time of the disposition, or subsequently becoming such by failure of the intermediate estate or estates, operates as a destruction of such remainder or reversion (sec. 15, and 39), and in this respect resembles a recovery. If a fine had been levied by tenant in tail under similar circumstances, a base *fee* was acquired which merged in the remainder or reversion, thereby bringing such remainder or reversion into immediate possession, and letting in all charges upon, and estates created out of it.]

results to *him* (i. e. tenant in tail) *and his heirs*, if no use is declared.⁷

[*101] *Where A. is tenant for life, with remainder to B. in tail, with remainder to A. in fee, and A. and B. levy a fine without declaring the uses of it: it should seem, that the use would result to A. for life, with remainder to B. and his heirs so long as he shall have issue, and in default of his issue, to A. and his heirs. But I am not aware, that the point has been determined.

The preceding observations are made upon the case of a feoffment or other conveyance without consideration, and without the declaration of *any part of the use*. The law equally favours a resulting use upon a conveyance, where only part of it is limited, and the remainder left undisposed of; it being a rule, that so much of the use as the grantor does not dispose of, remains in him.⁸ Thus, if a feoffment in fee be made to the use of the heirs of the body of the feoffor, the use is undisposed of during his life; it will therefore result, and then he will have an estate tail executed in him.⁹ So, if the use upon a feoffment in fee be declared to the feoffee for life, and no further declaration be made, the remainder of it will result to the feoffor:¹ or if the use in the first instance be limited to the feoffor in tail *without [*102] any further declaration, the use in reversion will result to him;² but not so, if the use be limited to the feoffor for *life* or for *years*; because if it did, the feoffor could not have an estate for life or years, as he intended.³

It is the intention of the parties, to be collected from the face of the deed, that gives effect to resulting uses. Therefore, it has been said, that the payment of 5*s.* or the like, serves as an implied declaration of the use to the feoffee, when it is not otherwise expressly disposed of. On the contrary, the want, both of consideration and de-

⁷ See post, as to the effect of a declaration, or the want of one, in breaking the descent.

⁸ [For whoever is seized of the land hath not only the estate of the land in him, but the right to take profits, which is in nature of the use.] Co. Litt. 23, a. [22 b. n. (3).] Woodliff v. Drury, Cro. Eliz. 439. Audley's case, Dy. 166, a.

⁹ 1 Mod. 161, 162. 1 Roll. Rep. 249. 22 Vin. 283, pl. 2, and the cases collected in the note. Ibid. 200, and cases in note to pl. 7. Post, s. 5, (5).

¹ See next page and 1 Ves. 488. ² Vide Dy. 111, b. in notis.

³ Ibid. Adams v. Savage, 2 Salk. 679. Rawley v. Holland, 22 Vin. 189, pl. 11.

claration shows, that the feoffor never intended to part with the use. This has been the construction, when no part of the use has been expressly limited. But the same rule does not hold, as I have already stated, where any part of the use is limited from the feoffor, &c. ; and the residue left undisposed of; for the express declaration in this case is presumptive proof, that he did not mean, that the grantee should have the remainder of the use. Therefore if an estate be granted even for a *valuable* consideration to feoffees and *their heirs*, to the use of them for their *lives*, it should seem, that the remainder of the use will result to the grantor: for the extent of the express limitation is the measure of the consideration.

*But when in a conveyance to a purchaser, the [*103] contract is recited to be for the purchase of the absolute fee-simple, the consideration extends to the entire use; so that I conceive, there can, in that case, be no resulting use to the grantor or vendor. The payment of the consideration money divests him of any beneficial interest, which constituted the use before the statute; and if any part of the use were to remain unlimited, it would vest, as it should seem, in the purchaser, upon the principle of modern trusts, resulting or arising by implication; "trusts result to the party *from whom the consideration moves.*" Pelly v. Maddin, 21 Vin. 498, pl. 15. A perplexing case sometimes arises in practice. A purchased estate is conveyed to the use of the releasee and his heirs during the life of, and in trust for, the purchaser, in order to prevent dower, and after the determination of that estate, to the use of the heirs and assigns of the purchaser. According to the limitation, the heirs would take as purchasers a contingent remainder in fee; and if the use resulted to the vendor, the purchaser could not convey, nor devise it, without another conveyance by the vendor; which construction appears to me improper, as the consideration has exhausted the use. The use would, I apprehend, vest in the purchaser by implication either for life (which would

* See Wilkes v. Leuson, Dy. 169. Wilkins v. Perrat, Moor, 876. Piers v. Hoe, Cro. Eliz. 131. 1 Leon. 125.—Booth's opinion cited, *sup.* See more of resulting uses, post, sec. 5; subdivisions 2 and 5.

obviate all difficulty,) or in fee, subject to the contingent remainder; and in the latter case, the purchaser [*104] *and his trustee might defeat the contingent remainder; but if not defeated, the purchaser would be prevented from devising the estate at law. In any way of considering the case, I think the purchaser must be considered as entitled to the beneficial interest⁵ in fee; for the limitation to the right heirs could not be considered as an advancement for them.

In the case of a springing use, arising from a seisin in fee simple, where there is no express limitation of the use, until the event happens upon which the springing use is to arise, the use will result to the grantor in fee simple. Thus if A. enfeoff B. and his heirs, to the uses following, that is to say, after marriage had between A. and Anne, his intended wife, to the use of A. and Anne, and the heirs of A.; the use until the marriage, will result to A. in fee.⁶

The Statute of Frauds, 29 Car. 2, c. 3, by an express saving, does not extend to trusts and confidences that arise or result by implication of law. It has however been said, that as a use now becomes a *legal* estate by the operation of the act, that clause is not applicable to it.⁷

[*105] It has been determined, that a resulting use *may be rebutted by parol evidence.⁸ But neither the grantor nor grantee can aver a use to a third person since the statute.⁹

(4) By the words of the Statute [of Uses] every species of real property (except copyhold estates¹), whether corporeal or incorporeal, in possession, reversion, or remainder, may be conveyed to uses. The property, however, must be *in esse* at the time of the creation of the use: Therefore if A. covenant to stand seised of lands, which he shall afterwards purchase, to certain uses; no use can arise by virtue of such covenant upon lands, of

⁵ [i. e. the *equitable* estate.]

⁶ 22 Vin. 220, pl. 1, (P).

⁷ Lamplugh v. Lamplugh, 1 P. W. 112.

⁸ Roe v. Popham, Dougl. 26. [Where a fine is levied for the purpose of making the cozenee tenant to the preceipe for suffering a recovery, it has been held that the use does not result to the coonor. Altham v. Lord Anglesey, Gilb. Rep. 16.]

⁹ 2 Salk. 676.

¹ See post, sec. 8.

which he may afterwards become the purchaser.³ So if A. convey his lands by bargain and sale to J. S. in fee, with *a way over other lands*; the right of way does not pass:⁴ because by the operation of the *bargain and sale* the *use* is first vested in the *bargainee*; and consequently there is no previously existing *seisin* of the right of way, out of which the *use* can arise. But the grant of a rent-charge *de novo* to *uses* is *within the statute:⁴ [*106] because the land is the *seisin* out of which it arises.⁵

(5.) In order that a *use* may be executed by the statute, there must be a *seisin* in the *feoffee* or *grantee* at the time of its execution: for, as Lord Bacon has observed,⁶ "The matter and substance of the estate of *cestui que use* is the estate of the *feoffee*, and more he cannot have." When a *feoffment* is made to A. and his heirs, to the *use* of B. and his heirs, or to the *use* of B. for life, with remainder to the *use* of C. in fee; here the *seisin* of A. is entire, and upon the execution of the conveyance, it is immediately transferred from him according to the limitation of the *use*. Vested remainders or reversions may be legally granted; and consequently *uses* may be limited upon the *seisin* so transferred in remainder or reversion: but consistently with the rule just noticed, as contingent remainders, or rents already granted to take effect upon a contingency, cannot be transferred at law during the suspense of the contingency, it follows, that no *use* can be limited *upon the [*107] transfer of such contingent remainder or rent. The statute transfers the legal possession or estate to the *use*; but a *seisin*, not legally vested, cannot serve a use.

³ *Yelverton v. Yelverton*, Cro. Eliz. 401. Moor, 342. 2 Roll. Ab. 970. 22 Vin. 27, pl. 7, 8, 9. A *feoffment* in fee upon condition that if feoffor do such a thing, he shall re-enter and retain the land to the *use* of a stranger, the *use* is void. 1 Leon. 269, pl. 362.

⁴ *Beaudley v. Brook*, Cro. Jac. 189.

⁴ *Bac. Uses*, 43.

⁵ [This does not appear to be correct, since a *bargain and sale* of a rent-charge *de novo*, to which the reason would equally apply, is not within the statute. 1 Bac. Abr. *Bargain and Sale*. The true reason why the grant (a common law assurance, be it observed,) is within the statute, seems to be, that the rent-charge is created by the grant itself, and that there is therefore something *in esse* for the limitation of *uses*, (which is subsequent to the grant, though contained in the same instrument,) to act upon.]

⁶ *Bac. Uses*, 47.

It sometimes occurs in practice, that a conveyance is made to A. B. and C. D., and the survivor of them, and the heirs of such survivor, to uses limiting the estate in strict settlement. In this case, the remainder to the survivor of A. B. and C. D. is a contingent remainder; and until the death of one of them, there is no actual vested seisin to serve the uses.

The seisin transferred by feoffment, fine, recovery, and lease and release, for the purpose of serving uses, may be called an actual seisin; but by the operation of the statute there may be a possibility of seisin, or *scintilla juris*.

First. *Of the actual or present seisin.* It may be considered as a general rule, that the seisin of the feoffee, releasee, &c., must be commensurate to the use declared upon it; or, in other words, cestui que use cannot have an estate in the use more extensive, than the seisin out of which it is raised. Thus if land be conveyed to A. for life, to the use of B. for life, in tail, or in fee, the estate of B. must determine upon the death of A.⁷

*If a seisin in fee be properly created, that seisin [*108] will serve uses declared upon it, although the person who created it had not an estate in fee simple in the lands conveyed. Thus, when a tenant in tail suffers a recovery, the use may be declared in fee:⁸ and if a tenant for life or years make a feoffment in fee, and the use be declared in fee, such use will be executed according to the extent of the tortious seisin acquired by the feoffment.⁹

Secondly. *Of the possibility of seisin.* The *scintilla juris*, or possibility of seisin, is supposed to exist in feoffees, releasees, &c., to uses, when all actual seisin is taken from them by the operation of the statute, in two particular cases: first, upon the limitation of springing uses: secondly, upon the creation of contingent uses. I shall in this place speak of springing and contingent uses, so far only as they will explain the nature of the *scintilla juris*.

⁷ Dy. 186, a. Vaugh. 49. Bac. Uses, 47. Cro. Car. 231. 3 Bulst. 184. See Crawley's case, Cro. Eliz. 721.

⁸ See ante, 99, 100.

⁹ Co. Litt. 10, a. 180, b. 188, a.

First, if a feoffment or lease and release be made, a fine levied, or recovery suffered to A. and his heirs, to the use of B. and his heirs, until C. pay a sum of money, and then to the use of C, and his heirs; in this case the use is executed in B. and his heirs by the statute; and as this use is co-extensive with the seisin of A., there can be *afterwards no *actual* seisin remaining in him: [*109] but when C. pays the money, the former use to B. ceases, and a new use springs up, and is executed in C. in fee. The question is, out of whose seisin is the secondary use to be served? It cannot be served out of the possession of B., because he is *cestui que use*; nor out of the original seisin of the feoffor, &c.; because the livery, &c., entirely divested him of all possession whatever.¹ Neither could the use of C. be executed until payment of the money; because the *two* uses could not exist at the same time.² To avoid these difficulties, it was said, that the use should arise out of the original seisin of A., the grantee; that although no actual seisin remained in him after the execution of the use to B., yet upon the cesser of the use limited to B., the original seisin reverted to A. for the purpose of serving the secondary use to C.: and that before the money was paid, this possibility of reverter of the original seisin should be considered as a *possibility of a seisin*, or *scintilla juris*.

Secondly: A feoffment is made to J. S. in fee, to the use of A. for life, remainder to the use of his first son unborn in tail, with remainder to the use of B. in fee. Does any and what seisin remain to J. S., until the birth of a son of A.? The solution of this question formed the great difficulty in Chudleigh's case.³ On the one hand *it was said, that an actual estate in remainder [*110] vested in J. S. to serve the contingent use, when it came *in esse*; whilst others were of opinion, that no part of the original seisin remained in J. S., and that the contingent use, when it should arise, must be served out of the former seisin of the grantee: that is to say, that as the whole seisin was taken out of J. S., so much of it as was necessary to serve the contingent use, when it

¹ Vide 1 Leon. 269.

² Co. Litt. 271, b.

³ See the case post, s. 8. 1 Co. 120, a.

came *in esse*, should remain in the preservation and custody of the law, and should not return to, or revest in, him. But both these opinions were considered erroneous: for, with regard to the first, as the use was limited to A. for life, remainder to B. in fee, this was commensurate to the whole fee, and did not admit of any intervening estate, until that limited to the son should arise; besides, if J. S. had a vested estate in remainder, he might enter for a forfeiture, and punish waste, &c.; and it is clear, that the parties intended him no such benefit. With respect to the second notion, it was thought to be against the words and meaning of the statute, which requires the grantee to be seised *at the time of the execution of the use*. But the true construction appears to be, that J. S. has not an actual estate or seisin during the suspense of the contingency; nor is the whole seisin taken from him;⁴ but that the possession is executed according to the [*111] *limitation of the uses; that as a new use will arise upon the birth of A.'s son, so as to precede the limitation to B., so upon that event a seisin, co-extensive with the estate in use limited to such son, will vest in J. S. for the purpose of serving it; and that until the contingency happens, J. S. has a mere possibility of seisin, which may never become actually vested in him.

The doctrine of *scintilla juris*, or possibility of seisin, has been generally admitted since the decision in Chudleigh's case, in the reign of Elizabeth,⁵ until the late Mr. Fearne⁶ suggested some doubts, as to the necessity and propriety of it in the case of contingent uses. The point has since become the subject of earnest controversy;⁷ but

⁴ [The whole *actual* seisin is taken from him; but what is meant is, that there is a possibility of the seisin returning or reverting to him.]

⁵ 1 Co. 120, a.

⁶ 1 Fearne, 300, (9th ed.)

⁷ Sugden on Powers, 1 vol. 18, 6th ed. Note to Gilb. Uses, 296. Rowe's Bacon, 151, and his Scintilla. [It was held by the majority of the judges in Chudleigh's case, that "no use can be executed by the stat. 27 Hen. 8, unless there be seisin in some person, subject to such uses *at the time of the execution thereof.*" (Oo. Rep. 136.) This construction of the statute being established, and the validity of limitations of future uses since the statute being assumed, it seems to follow by a kind of *reductio ad absurdum*, that there must be a possibility of seisin in the original feoffees to raise the future uses; for there is to be a seisin somewhere to serve the future uses when they come *in esse*, and that can only be either in the original feoffee, or in him who has the present use. But the seisin of a cestui que use cannot serve any other uses, since that would be a use upon a use; and thus there is only the feoffee who is capable of the requisite seisin. Then what is the nature of this capacity in the feoffee of serv-

*the author of this work, following the received opinion,⁸ considers the doctrine established upon principle and authority; and consequently he thinks that this possibility of seisin may be released *or destroyed, or by the failure of heirs of the grantee [113] to uses become extinguished.⁹

(6.) The words of the statute expressing the conveyance or deed, by which the use is created, are these, "bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any manner of means whatever."¹ Notwithstanding the generality of the above words, in order to raise the use by the statute, there must be either a direct or actual conveyance, operating by way of transmutation of possession, or a contract or covenant, operating as a *bargain and sale*, or a *covenant to stand seised to uses*; for as to *contracts and agreements*, which are merely referrible to actual conveyances, they certainly do not raise uses under the statute.²

ing the future uses? It cannot be any vested estate, because every actual estate of the feoffee is drawn out of him by the statute to serve the uses *in esse*; and the only remaining alternative is, that the feoffee has a possibility of seisin to take effect as the future uses arise, which is the *scintilla juris*.

It is contended both by Fearne in the Treatise on Contingent Remainders, and by Sir Edward Sugden, that the doctrine of *scintilla juris* has never received a regular judicial decision; the latter, indeed, asserts that the preponderance of authority is against the doctrine, treating Coke's report of Chudleigh's case as inaccurate, and adducing the observations of Lord Hardwicke, and Willes, C. J., in Garth v. Cotton, 1 Dick. 183, and Willes, 341. But neither Lord Hardwicke, nor C. J. Willes, in the cases referred to, seems to have disputed that the doctrine had been established, the former merely remarking that some of the reasonings of the judges in Chudleigh's case were very refined and speculative, and not very easy to comprehend; and the latter, even admitting the doctrine to have been a commendable *astutia*, though a great stretch in the court. To impugn some of the reasons on which a particular doctrine is founded, is not to deny that the doctrine itself has been judicially recognized or decided.

Mr. Fearne observes, (p. 299), that we ought to be very cautious how we, at this day, admit such a doctrine in practice, on account of the inconveniences to which it would lead: but all arguments which treat the matter as *res integra* must, of course, be excluded if the doctrine is to be considered as already established.]

⁸ Probably no man more accurately understood the laws of uses, and the construction of the statute, than the late Mr. Booth; and he certainly considered the doctrine of *scintilla juris* established. See opinion at the end of Shepherd's Touchstone. Indeed Lord Eldon, in Maundrell v. Maundrell, 10 Ves. 255, seems to consider the doctrine as peculiarly Mr. Booth's: "the use would engraff itself upon what Mr. Booth calls *scintilla juris*, in the releasees."

⁹ See post, sec. 5, (6, 7,) sec. 8.

¹ It seems, that there may be a surrender to a use. Cro. Eliz. 688. A use cannot be raised upon a release operating by way of *Mitter le droit*. 13 Co. 56. Note to pl. 1. 22 Vin. 209, (O. 3.)

² See Hore v. Dix, 1 Sid. 25. Petfield v. Pearce, 2 Roll. Ab. 739.

Thus,³ where T. S. by indenture, covenanted and granted, in consideration that A. B. had conveyed divers lands and tenements to him in fee-simple after the death of the said A. B., that the said T. S. would levy a fine to conuzees of other lands; by which fine the said other lands should be assured to the said T. S. for life, remainder to the said A. B. in tail; and no fine was levied: it was determined, that the covenant to levy a fine did not of itself change or raise a use.

*In another case,⁴ A. by indenture covenanted, [*114] that she would assure lands by recovery to B. (her son-in-law) to and for such uses as should in a subsequent part of the said indenture be declared. B. covenanted, that within eight months after the assurance made, he would make an estate to A. for life, remainder to B. and C. his wife in tail, remainder over in fee. The recovery was suffered accordingly; but no further declaration of the uses was made in the said indenture; nor were the estates conveyed by B. pursuant to his covenant. It was held, that neither the recovery, nor covenant by B. could change or declare the use, so as to execute it in A. for life, &c.; and that it could not result to A. in fee: because as she had her remedy against B. at common law by an action of covenant, no *subpoena* would lie to compel him to execute the estate.

By more modern resolutions, it has been determined, that articles entered into before marriage, to settle lands to certain uses, do not alone raise the uses; but that an actual conveyance is necessary.⁵ This principle was adopted in the case of *Trevor v. Trevor*.⁶ There A., in consideration of an intended marriage, covenanted with trustees before the end of two years to settle lands upon the said trustees, to the use of himself for life, without [*115] *waste, remainder to the use of his intended wife for life, remainder to the use of the heirs male of him on her body to be begotten, and the heirs male of such heirs male lawfully issuing, remainder to his own right heirs: and A. covenanted, that in case the uses

³ *Bainton's case*, Dy. 98, a. *Shep. Touch.* 82.

⁴ *Wingfield v. Littleton*, Dy. 162, a. See *Audley's case*, *ibid.*, 166, a.

⁵ See *Edwards v. Freeman*, 2 P. W. 436, 439, 447.

⁶ 1 P. W. 622. 1 Eq. Ab. 387.

were not well raised according to the meaning of the articles, then he and his heirs would *stand seised* of the premises, until such time as a farther assurance should be made thereof, *to the uses mentioned in the articles*. No settlement was made pursuant to the articles, and several years afterwards A. and his wife levied a fine of the same lands to other uses. The Lord Chancellor considered the whole of these articles, as in their nature *executory*: and, among other things, observed, that the covenant to stand seised in the latter end of them, could not be taken as a final settlement from the words of it; and that the precedent part of them was provisional only, viz. to stand seised till a settlement should be made.⁷

The preceding cases are upon covenants or contracts referring to a subsequent conveyance. The same rule seems to have prevailed, where the covenant is merely executory, and upon which an *action of covenant appears to have been the proper remedy, [*116] in case the covenant was not performed. Thus, when a father covenanted with his eldest son, that certain lands should, after the death of the father, descend, remain, or be to the son and his heirs; no use arose upon this covenant, because, as the book states, it was executory, and for which an action of covenant would lie.⁸ So where A., seised in fee, covenanted with B. in consideration of a marriage to be had between J. S. and J. D., that certain lands should, after the death of A. remain unto the use of the said J. D. and J. S. and to the heirs of the said J. D.: the marriage took effect; but it was determined that no use was raised by the covenant; it not being a covenant to stand seised, but merely that the lands should remain.⁹

To the preceding observations, it seems necessary to

⁷ In *Hylton v. Biscoe*, 2 Ves. 304, 308, Lord Hardwicke seems to have thought differently: "If John the father had had the legal estate, the deed in 1694 would have passed it; therefore it does not rest barely in covenant. If he had the legal estate, the covenant to stand seised would have had its operation in point of law."

⁸ *Blitheman v. Blitheman*, Cro. Eliz. 279. See Benl. 121, pl. 153. Moor, 122, pl. 269.

⁹ *Buckler v. Symons*, 2 Roll. Ab. 788. In *Crossing v. Scudamore*, 1 Vent. 141, it is said that no use arose in the case in Moor, 122, pl. 269, for the uncertainty how it was intended the daughter should take. See the different cases upon this point collected in pl. 1, 22 Vin. 211.

add the following case.—A. bargained and sold land to B. and his heirs for 500*l.*, upon condition that if A. paid B. 500*l.* he might re-enter, and be seised to the use of himself and his heirs, until he attempted to alien without the assent of B., and then to the use of B. and his heirs; and *a fine was levied to those uses. A. [*117] paid the 500*l.* and entered; and afterward aliened to J. S. without assent of B.

Per Ld. C. Egerton, no use will arise to B.; because A., entering for the condition broken, ought to be in of the old use and estate, and cannot be seised to the other use.¹

III. Having considered the several circumstances necessary to the raising and execution of uses by the statute; I shall now state the effect of the transfer of the possession to the use by the statute, as between the grantee and the cestui que use.

1st. *As to the estate of the grantee.* It is obvious, that as the statute has made the estate of cestui que use legal instead of equitable, and entirely divested the feoffees, releasees, &c. of all estate whatever, most of the incidents which attended the use in its fiduciary state, are now at an end. With respect to the feoffee, he has no interest at all in the land; and therefore on his account, it cannot escheat, nor be forfeited;² nor is it subject either to dower or courtesy on account of his momentary seisin.³

[*118] However, as the statute only *transfers the legal estate to the use, it does not interfere with the title-deeds: and therefore it is a point which appears to me to be clearly settled, that the feoffee, or grantee to uses, is entitled to the custody of them.⁴ Upon this ac-

¹ Holloway v. Pollard, Moor, 761.

² [But where the feoffee is an alien, or has at the time of the feoffment committed treason, vide ante, pp. 85, 86.]

³ See 2 Comm. 333. Sneyd v. Sneyd, 1 Atk. 443. Note, pl. 31. Dyer, 283, b. [Nor if the feoffee or releasee be possessed of a term of years, will the term be merged by the momentary seisin to uses, Cheney's case, 4 Leon. 234. Mo. 198, pl. 345. Ferrers v. Fermor, Cro. Jac. 643. But where a termor joins with him who has the remainder or reversion, in making a conveyance to a third person to uses, the term will be extinguished.]

⁴ Estofte v. Vaughan, Dyer, 277, a. Stockman v. Hampton, Cro. Car. 441. Huntingdon v. Mildmay, Cro. Jac. 217. Reynell v. Long, Carth. 315. Whitfield v. Fausset, 1 Ves. 387, 394. [So also in Jenkin v. Peace, 6 Mee. & Wels. 722,

count it has been repeatedly determined, that a *profert* is *not necessary in pleading a gift under the [119] statute of uses.⁵

It was admitted as unquestionable, that in pleading a conveyance by lease and release, *profert* need not be made of the lease, for the reason mentioned in the text. It was held also, that where the party pleading the conveyance is himself the releasee, he must make *profert* of the release; because a release is a deed operating at common law, and therefore the releasee is the person who, according to law, must be presumed to have possession of it.

Sir Edward Sugden contends that the statute of uses operates as a legislative conveyance to the *cestui que use* as powerful as the common law conveyance to the feoffee to uses; and that as the latter conveyed the right to the deeds, although they were not granted, so the former ought to have as powerful an operation in transmitting them with the estate to the *cestui que use*, *Vend. & Pur.* vol. ii. p. 108, 10th ed. It might, moreover, be contended (if the point were *res integra*) that the reason for giving to a *cestui que use* the benefit of covenants running with the land (*post*, p. 120), is equally available as to the transmission of the right to the title-deeds. *Appowel v. Monnoux*, Mo. 97. *Roll v. Osborne*, Mo. 859. Sir Edward Sugden, however, admits that the authorities are in favour of the position in the text; and Lord Hardwicke treated the point as clearly established, though hesitating to approve of the reason. 1 *Ves.* 394.

But Equity, in adopting the rule, that the tenant for life, having the legal estate, is entitled to the custody of the deeds, (*Bowles v. Stewart*, 1 Sch. & Lef. 223; *Churchill v. Small*, 8 Ves. 32, n.; *Banbury v. Briscoe*, 2 Ch. Ca. 42,) does not appear to have regarded the above distinction between an estate at common law and one derived under the statute of uses, (see *Duncombe v. Mayer*, 8 Ves. 320); and as the case of a mere partial interest in the *cestui que use* is the only one in which a court of equity could be supposed likely to resort to the legal right of the feoffee, or releasee to uses, it follows that the distinction in question can never affect the equitable right of the *cestui que use* to the deeds.

As between the respective owners of different estates, held under the same title, seeking to obtain possession of the title-deeds, and when no right of *retention* comes in question, the owner of the most valuable estate will be preferred in equity; and therefore where an estate is sold in several lots, the purchaser to the greatest amount will be entitled to have the deeds. See an Order on this point (said to be settled by Lord Hardwicke), in *Hind's Chancery Practice*. That a purchaser is entitled to attested copies of the deeds, and a covenant to produce the originals, wherever they are not in the possession of the vendor, is also clear. But is a purchaser, in the absence of any special stipulation on the point, under any circumstances, bound to be satisfied with such a covenant and the attested copies, where the vendor himself has the deeds? It is submitted as a general rule, that a purchaser has a right to assume, that he is buying on the ordinary terms, one of which is, that the purchaser shall have the deeds delivered to him, if in the vendor's possession, on the completion of the purchase. But, of course, if the purchaser is expressly informed that he is not to have the deeds, or perhaps if he has notice either from the contract, or *aliunde*, that the vendor has a reasonable ground for claiming to retain the deeds (as where the subject of the contract is a small portion of the property to which the deeds relate), the case would be an exception to the general rule. Where any case is alleged to be such an exception, a court of equity would probably incline to the vendor, owing to the rule as to covenants for the production of deeds, that they run with the land for the benefit of purchasers, but not for the benefit of vendors (1 *Sim. & Stu.* 453).

In cases of partition, under a decree, the deeds are ordered to remain with the master for the benefit of both parties. *Seton, on Decrees*, 188. *Trodd v. Downes*, there cited.]

⁵ See cases *supra*, and 3 *Term. Rep.* 156.

[*120] *2dly. *But as to the estate of cestui que use*, it is subject to escheat, to courtesy, dower, and all the incidents, to which a *legal* estate is liable.⁶

Rents conveyed or limited to uses are executed by the statute; and *cestui que use* is entitled to all remedies and rights relative thereto; but not to *collateral* rights.⁷

The 14th section of the statute of uses, which vests in *cestui que use* the same or the like advantage, benefit, voucher, &c., is expressly confined to estates made before the 1st of May 1536; and from this circumstance there is ground to suppose, that none of these benefits would have been carried to the *cestui que use* by the general words of the act. But it is clear, that *cestui que use* is entitled to all benefits and advantages inherent to the estate, and to covenants running with the land.⁸

[*121] *In Lincoln College's case, it is said, “That he who hath a reversion by a limitation of a use, although he be in the post, yet he shall take benefit of a condition, as an⁹ *assignee* within the statute of 32 Hen. 8, c. 34.”¹

⁶ See 2 Comm. 333.

⁷ [As a covenant with the grantee to pay the rent to the use of *cestui que use*.] Boscawen and Herle v. Cook, 1 Mod. 223. 2 Mod. 138, S. C.

⁸ [Because the statute of uses transfers the legal estate to the *cestui que use*, who thereupon becomes as much entitled to the benefit of covenants entered into with the feoffee to uses, as if the statute of uses had not been passed, and there had been an actual transfer or conveyance of the legal estate from the feoffee to the *cestui que use*. Lee v. Arnold, 4 Leo. 27. S. C. (reported under the name of Appowel v. Monnoux). Mo. 97, pl. 241. Roll v. Osborne, Mo. 859, pl. 1180. According to this rule, if an estate be conveyed to A. B. and his heirs, to such uses as he shall himself appoint, and in default of appointment to the usual uses to bar dower in favour of A. B., and A. B. exercise his power of appointment, the appointee will have the benefit of covenants for title entered into in the original conveyance with A. B., his heirs, and assigns; for upon the execution of the appointment, A. B. himself, with whom the covenants were entered into, becomes seised to the use of the appointee, to whom the legal estate originally conveyed to A. B. is thereupon transferred by the statute. It is to be observed, that in the case of Roach v. Wadham, 6 East, 289, in which there had been a conveyance to such uses as a purchaser should appoint, and an appointment by the purchaser under the power, and where it was held that the covenants of the purchaser, for himself, his heirs, and assigns, did not bind his appointee, the original conveyance to uses was not to the purchaser himself, but to another party, so that the use limited to the appointee arose out of the seisin of one who had not entered into the covenants. As to the general doctrine of covenants running with the land, see the case of the Duke of Bedford v. the Trustees of the British Museum, 2 My. & Kee. 552. Keppel v. Bailey, ib. 517. Riddell v. Riddell, 7 Sim. 529. Whatman v. Gibson, 9 Sim. 196. Schreiber v. Creed, 10 Sim. 9.]

⁹ But an assignee cannot take advantage of the implied condition annexed to an *exchange*. Bustard's case, 4 Co. 121, a. See also Coventry v. Coventry, 3 Note ¹ see next page.

And in *Smith v. Tyndal*,² it is one of the resolutions of the court, "that though a cestui que use is in the post, and not in the per, yet he may take advantage of warranty annexed to his estate; ratio est, because by the statute of uses, the estate in law in possession is transferred to his use, and he is tenant of the legal estate, and has all advantages that the tenant had before to defend his estate; therefore he may rebut, for that is to defend; but he cannot vouch, for that is to recover in value for the loss."

In the case of *Roll v. Osborne*,³ Warburton thought, "that the stat. 27 Hen. 8, of uses gave the benefit of the warranty to cestui que use, and that he shall vouch as assignee, and have warrantia chartæ; and that tenant for life created by an use, shall have benefit for his time of the warranty, and may vouch, or have warrantia chartæ; but that he must make his count accordingly."

IV. I proceed to explain in what respects legal estates created, or uses executed, by the statute, correspond with the rules of the common law.

And first, with respect to the limitation of estates in fee-simple.

It is settled, that the same words, which are necessary to create an estate in fee upon a conveyance *at common law, are equally necessary upon a conveyance to uses since the statute.^{4(a)} It is true, that if before the statute, a man had bargained and sold his lands for a valuable consideration, without having limited the use to the heirs of the bargainee, Chancery,

Atk. 365. It seems to follow, that where an exchange is made under a power of exchanging, reserved in a settlement, there should be an express power reserved to the cestui que use of entry in case of eviction. See tit. Lease and Release, 2 vol. at the end of that title.

¹ Co. Litt. 215, a. b. *Appowel v. Monnoux*, Mo. 97. 8 Leon. 225, in Scot's case.

² Salk. 685. ³ 2 Mo. 859, pl. 1180. Trin. 9 Jac.

⁴ [The construction of a surrender (to uses) must be the same as if the estate had been limited by feoffment, or any other deed, and must be alike governed by the same rules of common law: per Holt, C. J. in *Idle v. Cook*, 1 P. Wms. 77. And see *Doe v. Smeddle*, 2 Barn. & Ald. 126. *Chambers v. Taylor*, 2 My. & Cr. 376.]

(a) *Vanhorn v. Harrison*, 1 Dall. (Penn.) 137. See *Jackson v. Fish*, 10 Johns. (N. Y.) 456. Trusts for accumulation of income are as rigidly restricted by the rule against perpetuities as legal estates. *Hillyard v. Miller*, 10 Barr. (Penn.) 133.

which considered the intention of the parties, would have decreed an estate *in fee*.⁵ But as the statute now executes the use, and the bargainer has a legal estate, the same construction must be had upon this legal estate by the statute, as upon estates by the common law; and, therefore, in the case put, the bargainer, since the statute can only have an estate for life.⁶ So it seems, that

⁵ 1 Co. 100, b.

⁶ Corbet's case, *ibid.* 87, b. Jenkins, 332, pl. 65. "The use of a fine is limited to A. by indenture, without mention of any estate in particular: this is an estate for life."

It is proper to notice in this place the case of *Kenworthy v. Bate*, 6 Ves. 793. An estate was settled by deed "to the use of such child or children of B. P. (without adding, for such estate or estates), as the said B. P. should by will appoint." The Master of the Rolls is reported to have said, "In this case, there is an absolute power to give the *fee-simple* to any one of the children."

It is probable, that the Master of the Rolls did not advert to the omission in the power of the words, "for such estate or estates;" for it would be difficult to show, that the power without these words would authorize the appointment of the legal estate in *fee-simple* to a child. If the estate had been settled by the deed itself "to the use of the child or children of B. P.," without adding words of limitation, the children would, beyond doubt (even in the case of a will, *Foster v. Romney*, 11 East, 594,) have taken life-estates only: and the power merely authorizing an appointment "to the use of such child or children," upon what ground can the limitation of the use by the exercise of the power be more extensive than the same limitation would have been, if originally inserted in the deed itself? In a subsequent case of a will, where there is a greater latitude of construction, the Court of King's Bench considered the words, "in such manner and form," to be equivalent to the words, "for such estate or estates;" but declined to give any opinion upon the effect of a power, where there were no words of similar import. See *King v. Marquis of Stafford*, 7 East, 521, 526.

[The view taken by the author seems to be confirmed by the cases of *Liffe v. Saltingstone*, 1 Mod. 189. 1 Freeman, 149, 163, 176, and Carter, 232 (under the title of *Anonymous*), *Godolphin v. Godolphin*, 1 Ves. Sen. 21, and *Casterton v. Sutherland*, 9 Ves. 446.

The judgment of Chief Justice Vaughan, in *Liffe v. Saltingstone*, as reported by Carter, 232, contains all the facts of that case, and was to the following effect:

"The case is upon the clause of a will; the words are, 'I will and bequeath (the lands in question) to my wife during her natural life, and after *by her to be disposed of* to such of my children as she shall think fit.' The question is, what estate the wife hath? A devise to another to dispose as he shall think fit, or at his discretion, is an estate in *fee*. I agree the cases. I know no difference between devising land to be disposed of by him, and to be disposed at his will and pleasure.

"But in our case I hold the wife hath no estate in *fee*; she hath only an estate for life, but there is a power in her to *specify* an estate to another; as, I covenant to demise lands to such persons for as many years as J. S. shall dispose it to; now here is nothing by way of gift, but a power of specification, and therefore the word (*dispose*) carries no *fee*. This word (*dispose*) cannot signify *give*, for none can dispose of more than he hath, and here is an estate for life only to the wife. Let us turn the words equivalently: I will and bequeath the lands in question at my wife's dispose, to such of my children as she shall think fit. Now this way, the children do take it expressly by the gift of the testator; and the words (*at her dispose*) are with relation to the children, and not to the estate; and when she hath disposed of it to any child, that child shall have but an estate for life; she hath the nomination or specification." The other judges

if a feoffment be made *to the use of B. and his *heires male lawfully engendered*, as this limitation [*126]

of the Common Pleas, however, Ellis, Wyndham, and Atkins, were of a contrary opinion. Their reasoning (according to the report in 1 Mod. 189), seems to have been, "that the wife took by the will an estate for her own life, with a power to dispose of the fee." They admitted that she could not take a larger estate to herself, by implication, than an estate for life; because an estate for life was given to her by express limitation. 1 Bulst. 219, 220. Whiting and Wilkin's case: (and for cases resembling the case in question were cited, 7 Ed. 6; Brook, Tit. Devise, 39; 1 Leon. 159; and Daniel and Uply's case, and Clayton's case in Latch.) To the objection that in Daniel and Uply's case, (there were these words, "at her will and pleasure," they answered, "that if she have a power to dispose according to her discretion, it is as she herself pleaseth; and then, expressio eorum que tacite insunt, nihil operatur. If I devise that J. S. shall sell my land, he shall sell the inheritance, Keilway, 43, 44. 19 Hen. 8, fol. 9. Where the devisor gives to another a power to dispose, he gives to that person the same power that himself had." The case, therefore, seems to have been decided on the ground, that the grantee of the power had, in herself, the power to dispose of the estate among the children in the way she thought proper; and as the testator might have devised it to them in fee, so she might do the same. It was not considered by the majority of the judges to be merely a power to nominate or specify the children that were to take; but that the actual disposition was given to her, and that it depended on her alone to fix the estate which the children were to enjoy in the lands devised. On the other hand, it seems to have been admitted on all sides, that if there had been no power in the wife to dispose of the fee, and she had had merely a power of specification, or nomination, the children could not have taken in fee for want of words of inheritance in the original devise by the testator. It may be observed too, that strong as the words in the power seem to have been, Atkins, J. was at first disposed to agree with Chief Justice Vaughan, that the children could take only an estate for life, and that Vaughan was so little convinced by the arguments of his colleagues, that though forced to yield to them, "il dit, subirascens, sententiae numerantur non ponderantur."

In Godolphin v. Godolphin, 1 Ves. s. 21, (decided in 1747, a power was given by will to M. D. to settle on "any person or persons for their several lives, who are or shall be hereafter at any time descended from my mother," as (M. D.) shall think fit, in such manner and proportion, and subject to such rules and directions as she shall in her direction order and appoint." Lord Hardwicke, Chancellor, held, that the words "manner and proportion" did not in themselves enable M. D. to limit a larger estate than for life.

In the case of Casterton v. Sutherland (decided in 1804), the devise was "unto and amongst all and every our children in such manner and in such proportions as my said wife shall, either in her lifetime or by her last will and testament, direct and appoint." The Master of the Rolls (Sir William Grant), seemed to be of opinion, although the case was not determined on that ground, that the power did not authorize a limitation of the fee.

From the two last cases, it may be collected to have been the opinion of the courts, that in order to justify the limitation of an inheritance under a power, words indicative of the intention of the testator to give a power of disposition, co-extensive with the inheritance must be used; but that the expressions, "manner and proportion" were not sufficient for that purpose.

However, in the King v. the Marquess of Stafford (decided in 1806, and cited by the author), where the words of the devise were, to the use and behoof of the lawful issue of her body "in such parts, shares and proportions, manner and form," as she should by deed or will direct, the Lord Chief Justice (Ellenborough) held, that the devise gave a power to appoint in fee.

Lord Ellenborough therefore differed from Lord Hardwicke and Sir William Grant, as to the force which ought to be given to the words "manner and proportions;" but he founded his judgment that the power in question authorized

[*127] would at common law *have created an estate in fee-simple, so it will upon a conveyance to uses.⁷

(2.) It is a rule generally established, that the word *heirs* is necessary to create an *estate tail* upon a conveyance at common law.⁸ It is the same with respect to a deed operating by way of use.⁹ Therefore if a feoffment be made to the use of J. S. and the *issue*, or *issue male*, of his body, this limitation cannot raise an estate tail in J. S.¹ In the case of *Leigh v. Brace*, a feoffment [*128] *was made to A. and B.,² and their heirs, to the use of W. B. for life, with remainder to the use of T. B. and his heirs for ever; and for default of *issue* of the body of T. B., remainder over. It was adjudged, that T. B. took an *estate tail*. This case, however, cannot be considered as an authority against the rule alluded to: for as the limitation was to T. B. and his *heirs*, the subsequent words, *in default of issue of the body*, were only intended to explain the extent of the preceding limitation, or what particular class of *heirs* should take, viz. *heirs of the body*. In this view, the same limitation would have created an estate tail at common law;³ and

a limitation in fee, upon the ground that those words must be understood as meaning something more than a power to make an unequal division among the objects who were comprised in it, and that they must, on the contrary, import a power of determining the nature and quantity of the estate they should take.

The principle, therefore, appears to have been the same throughout all the above cases; and it accords with the author's doctrine, that by the exercise of a power, an estate cannot be limited of a more extensive nature than that limited by the original instrument, unless words are used, showing an *intention* that the power of determining the quantity of estate should be left to the donee of the power. A difference of opinion has prevailed, whether the words "manner and proportions" should have that effect; but where no expression whatever appears to denote that such was the intention of the party creating the power, it would seem there is no ground for enlarging the estate, and that, as the author suggests, the Master of the Rolls when he decided the case of *Kentworthy v. Bate* had not his attention pointed to the fact, that the words "for such estate or estates," or any words of a similar import, were not included in the power. See, however, Sir Edward Sugden, contra, Sug. Pow., 6th edit., vol. i. 503, et seq.]

⁷ *Abraham v. Twig*, Cro. Eliz. 478, note 2. Har. Co. Litt. 20, b.

⁸ Co. Litt. 20, a. 2 Inst. 334.

⁹ [Cases have, however, occurred even under deeds, where, upon the construction of the instrument, estates tail have been held to have been created without the introduction of the word "heirs." *Owen v. Smyth*, 2 H. B. 594. *Galley v. Barrington*, 10 B. Moore, 21. 2 Bing. 387, S. C.]

¹ *Nevel v. Nevel*, 1 Roll. Ab. 837. 1 Brownl. 152. *Makepeace v. Fletcher*, Com. Rep. 457.

² Carth. 343. 3 Salk. 337. 1 Id. Raym. 101. Rep. Temp. Holt, 668. 5 Mod. 256.

³ See *Perk. s. 171, 173. Year Book, 19 Hen. 6, 74*, per Vampage. Co. Litt. 21, a. Note to 1 P. W. 57. 2 vol. of *Cases and Opinions*, 279. Mr. Booth's

it is observable, that none of the reporters of this case (except Carthew) mention, that it was determined upon the principle, that limitations in a conveyance, operating by way of use, should be construed in a different manner from mere common law conveyances. But admitting the case to have been adjudged upon the principle stated by Carthew, the subsequent case of *Makepeace v. Fletcher*,⁴ has established the doctrine in *Nevel v. Nevel*.

(3.) Whether words *regulating* or *modifying* an [*129] *estate created by a deed, operating by way of use, shall be construed in a different manner, when applied to a common law conveyance, is a point upon which there has been a difference of opinion. Lord Hardwicke, in a case where the question was, whether the words, *equally to be divided*, would create a tenancy in common, in a deed operating by way of use, observed, that though *limitations* in a deed to uses could have no greater latitude than in common law conveyances, yet as to words of mere *regulation* or *modification* of the estate, he saw no harm in giving them a reasonable construction to answer the intention; and he accordingly held, that those words created a tenancy in common:⁵ on the other hand, Lord Thurlow, in a case nearly similar,⁶ expressed himself thus: "The question is, whether *deeds to uses*, in the nature of wills, should be construed so widely as wills have been? I should be sorry to give into this; for I think no good has been done by the wide construction of wills."

Yet it seems to be in fact determined, that both in a covenant to stand seised to uses, *and in a lease [*130] and release,⁷ and in a surrender of copyhold property,⁸ the words, "*equally to be divided*," will create a

opinion. Co. Litt. 20, b. Year Book, 5 Hen. 5, 6. *Shelly v. Sarsfield*, 10 Vin. 256, pl. 9.

⁴ Com. Rep. 457.

⁵ *Rigden v. Vallier*, 2 Ves. 252, 257. 3 Atk. 731. See also *Goodtitle v. Stokes*, 1 Wils. 341, and 2 Vent. 365. *Fisher v. Wigg*, 1 P. W. 14. "Though the law is strict against estates at common law, which are to arise upon conditions precedent, yet it is not so in limitation of uses, where the intent is to guide the estate, no more than 'tis in devises." *Moore*, 519. Arg. cites *Page's* case, 31 Eliz.

⁶ *Stratton v. Best*, 2 Bro. Cha. Rep. 233.

⁷ *Goodtitle v. Stokes*, 1 Wils. 341. 2 Vent. 365.

⁸ *Fisher v. Wigg*, 1 P. W. 14.

tenancy in common. There has then been a deviation from the strict rule of the common law, in the case of creating a tenancy in common; and this deviation has been derived from the construction of wills, in order to favour the intention. It may, therefore, be a question, How far the rule as to wills may be extended to limitation of uses? The word "*respective*," and the word "*several*,¹" in a will, seem equivalent to the words "*equally to be divided*," and ought not these words to have a similar operation in the limitation of uses?

(4.) It is a maxim of law, that a condition or limitation annexed to an estate, ought to destroy the *whole* of the estate to which it is annexed, ^{*and not a} [*131] *part only of it.*² This rule is applicable to limitations by way of use, which operate so as to defeat or avoid estates; therefore, if an estate be limited to the use of J. S. *in tail*, with a proviso, that if he do such an act, his estate shall cease *during his life*, this proviso is void.³ It was agreed, that lands should be limited to the use of H. C. and the heirs male of his body, with divers remainders over, and with this proviso, "That if the said H. C., or any of the heirs male of his body, should attempt or make any feoffment, &c., that *his estate* should cease *as if he was dead*, and that then the said W. B., and the other feoffees, and their heirs, should stand seised to the use of such person, to whom it ought to descend or remain by the said deed intended, as if he was dead, with the remainders over as aforesaid." The proviso was considered repugnant and void.⁴ However, as a condition may be annexed to an estate tail to deter-

¹ Per Roll. C. J., in *Forrell v. Frampton*, Lyle, 434; and see *Heathe v. Heathe*, 2 Atk. 121.

² See *Sheppard v. Gibbons*, 2 Atk. 441. [The rule as to wills has been extended very far. The expressions "equally amongst them," *Warner v. Hone*, Ch. Prac. 491; "unto and amongst," *Campbell v. Campbell*, 4 Bro. C. C. 15; "share and share alike," *Heathe v. Heathe*, 2 Atk. 121; "respectively," same case; "in joint and equal proportions," *Ettricke v. Ettricke*, Ambler. (Blunt's ed.) 656; "between them," *Lashbrooke v. Cock*, 2 Mer. 70; and "to be divided among you," *Ackerman v. Burrows*, 3 Ves. & B. 54, have been held to create tenancies in common. As to other expressions which will create a tenancy in common in a will, see the case of *Doe dem*. *Littlewood v. Green*, 4 Mee. & Weis. and the authorities there cited.]

³ 1 Co. 86, b. 4 Burr. 1941. Litt. s. 720, 721, 722, 723.

⁴ 1 Co. 86, b.

⁴ *Cholmley v. Humble*, cited 1 Co. 86, a. See *Corbet's case*, *ibid.*, 83, b. *Mildmay's case*, 6 Co. 40, a. *Tarrant's case*, *Moor*, 470.

mine it *wholly* by the re-entry of the donor or his heirs,⁵ so a limitation by way of use may enure to defeat an estate tail, as if tenant in tail were dead, *without heirs of his body*.⁶ This doctrine has given rise to the introduction of two species of provisoes in modern practice. The one is adopted in a settlement of estates, where [132] it is intended that the person in possession of them, under the settlement, should use the name, and bear the arms of the settlor; and in case of refusal or neglect, that the uses and estates thereby limited shall cease and determine, as if the person so refusing or neglecting, being tenant for life, were dead, or being tenant in tail, were dead without issue inheritable under the intail.⁷ The other proviso is used in settlements, for the

⁵ Litt. s. 362. Croker v. Trevithin, Cro. Eliz. 35. 1 Leon. 292.

⁶ Vide Mary Portington's case, 10 Co. 36.

⁷ See the form of such proviso, Butl. note (2). Co. Litt. 327, a; and 2 Bridg. Con. 8, 10, 469, 575, and Appendix I.

[It seems that where (as in the form in the Appendix) the limitation by the proviso is to the person or persons who, under the preceding limitations, would be next in remainder, in the same manner as if the prior estates had ceased by the natural course of their determination, such proviso does not operate as a creation and substitution of new estates in remainder by way of shifting use, but simply as a cesser and avoidance of the old estate, and in acceleration of the remainder. See the case of the Earl of Scarborough v. Doe dem. Savile, in the Exchequer Chamber, in error from the King's Bench, 3 Adol. & El. 897. In that case a will by which lands were devised in strict settlement contained a proviso, that if a certain earldom should descend to any of the tenants for life, or any of their sons, the successive remainder-men in tail, the estate of the person to whom the title should so come should cease, and the lands go over, in the same manner as if he were dead without issue, to the person or persons next in remainder. The tenant for life in possession, and his son, the next remainder-man in tail, suffered a recovery, and afterwards the earldom descended upon the tenant for life. It was admitted in the court below, that this recovery destroyed the proviso so far as it was attached to the estate tail, and all the subsequent estates; but it was considered that the life estate of the tenant for life (he not having been vouched in the recovery), was still subsisting, that the proviso in question, as attached to that estate, was not barred (3 Adol. & El. 41), and that the estate tail arising under the proviso upon the descent of the title on the tenant for life was a new estate, precedent in point of limitation to the estate tail of the party who suffered the recovery, and consequently was not affected by such recovery. The Court of Error, however, held that the estate coming into possession by the operation of the proviso, was the same identical interest which the next remainder-man took under the limitations of the will, and which the recovery had destroyed; and in this view it seems immaterial whether the proviso in question be held to act as a conditional limitation, which was the effect apparently attributed to it by the Court in the case referred to, or a springing use. But conditional limitations, in the sense in which the term is here used (with respect to which see post, page 158), are void in a deed; and therefore in a settlement the proviso must operate, if at all, as a springing use, not creating new estates, but merely accelerating the remainders.

For some observations on the construction of a proviso of this description, see Motrice v. Langham, 8 Mee. & Wels. 194.]

[*133] purpose *of defeating the estate of a tenant in tail, in case he shall become entitled to a certain other estate; and limiting or shifting the use upon that event to another person, as if such tenant in tail were dead without issue.⁸

(5.) Another maxim is, that a man cannot make a fraction in an estate, in the case of a limitation by way of use, which cannot be done in a conveyance by livery in possession. Therefore Walmesley,⁹ J., said, "If a man makes a feoffment in fee of land to the use of A. and his heirs every Monday, and to the use of B. and his heirs [*134] *every Tuesday, and to the use of C. and his heirs every Wednesday, these limitations are void, for we do not find any such fractions of estates in law."

(6.) It remains to observe, that the statute executes no limitations of a use, which, if executed, would be fraudulent, and thereby abrogate the law. Thus, if there be a limitation to the use of A. and his heirs, provided that if he give a mortal blow to any person, the use shall cease as to him, and remain over; this is fraudulent to prevent an escheat, and therefore void.¹

V. However, in some cases the manner of creating and limiting estates has undergone considerable alterations since the introduction of conveyances to uses.(a)

(1.) It was absurd, that a man should make a convey-

⁸ See Appendix II. 1. Bridg. Con. 304; also Nicolls v. Sheffield, 2 Bro. Cha. Ca. 215. Doe v. Heneage, 4 Term. Rep. 13. Stanley v. Stanley, 16 Ves. 491.

⁹ 1 Co. 87, a.

¹ Moor, 633. 3 Atk. 180.

(a) Judge Sergeant says (Sergeant's Land Law of Pennsylvania, p. 243,) of Pennsylvania law, what may be said generally of American law, where, although the Statute of Uses is, in almost all of the States, either adopted or substituted by like legislative provision, the learning of conveyancing as arising, and in England, practised under the Statute of Uses, is superceded in practice by acts providing for the recording of deeds, and giving to them when so recorded their legal effect: "So on the other words of the act (of 1715, giving effect to recorded deeds,) 'shall be of the same force and effect here for making good the title and assurance of the said land, &c., as a feoffment and bargain or sale,' though neither the ceremonies nor the language of a feoffment are observed, though there be not the requisites of a strict bargain and sale, yet the same effect shall be produced. All the advantages arising from the flexibility of conveyances to uses in modifying the estates conveyed, all the solidity of a feoffment in giving actual possession, seem to be conferred on conveyances recorded; at the same time what is noxious is rejected. They are not to give possession when the grantor is out of possession. They are not to transfer any tortious estate, and so have our courts considered them.

ance, or give possession by a livery of seisin, to himself; and therefore if a feoffment had been made to a stranger and the feoffor, the stranger took the whole.² But now, if a feoffment be made to the use of the feoffor, or to the use of the feoffor and a stranger, it is a good limitation of the use, and the statute executes it in the feoffor alone in the first instance, and in him and the stranger in the second. As this manner of limiting the use to, and vesting the legal estate *in, the feoffor, [*135] releasor, &c., by one and the same conveyance, is quite contrary to the simple mode of conveyancing adopted by the common law, so it is the more convenient and the less expensive method. Thus, for example, it frequently happens, that upon the death or removal of trustees, it becomes necessary to fill up their number pursuant to a power for that purpose, usually introduced into settlements of real property. In order to effect this, it is now the practice for the old trustees to make a conveyance, which operates by way of transmutation of possession (generally by lease and release) unto the new trustees and their heirs, to the use of the old and new trustees and their heirs.³ Without the assistance, therefore, of the Statute of Uses, it would have been necessary in the above case, that the old trustees should have first enfeoffed A. B., who would have re-enfeoffed the old and new trustees jointly; thereby making two conveyances necessary. Indeed, in the case of terms of years and

² Perk. s. 203.

³ See precedents, 1 Horsem. 319, 334 to 343.

"We perceive here almost verified the wishes of the first legislature; and that without prescribed forms, any conveyance of lands duly recorded, carries with it all the vigor and efficacy of the two ancient modes of conveyancing, one at common law by feoffment, the other originally of the use which afterwards, by statute 27 Henry 8, was executed, viz., by bargain and sale enrolled. Of course our deeds are comparatively brief. It is sufficient if there appear an intent to convey, whatever may be the language; provided, however, that in limiting the quantity and quality of the estate, appropriate terms must be employed. We cannot by deed, any more than by feoffment, or bargain and sale, ordinarily convey a fee simple without the word heirs, or a fee tail without the words heirs of the body. But if words of grant, bargain, sale, feoffment, release, confirmation are thrown in *valeant quantum valere possint*, and the powerful machinery of the Statute of Uses is liberally employed in our deeds, and produces the desired effect. We have thus obtained by this act a power which is exercised with little trouble, and as effectively as the complicated conveyancing of the English practice by lease and release."

other personal property, two assignments are still required for the above purpose.⁴

As a man could not at common law convey to himself, so neither could he make a conveyance to his wife;⁵ but by limiting a seisin to the feoffee, releasee, &c., he [*136] may declare the use to *his wife, which use will be executed by the statute.⁶

This method of vesting the legal estate in the grantor by his own conveyance can be effected by a feoffment, fine, recovery,⁷ or lease and release; for in each of these, the seisin is conveyed to the feoffee, &c., and that seisin is sufficient to serve uses declared to the feoffor, &c., or to any other person. But in a bargain and sale, where the use first passes, and then the possession is executed in the bargainer by the statute, no other use can be declared upon his estate; according to the rule, that a use cannot be limited to arise out of a use.⁸ And yet a man may covenant to stand seised to the use of himself.

(2.) By the common law, a man could not make his own heir a *purchaser*, even of an estate *tail*.⁹ This maxim was indeed a necessary consequence of the preceding rule, that a man could not convey, nor limit a remainder to himself; for *filius est pars patris*¹—*haeres est pars antecessoris*.² Therefore, if a gift had been made in tail or for life, with remainder to the heirs male of the body of [*137] the grantor, this remainder would have been *void. But since the introduction of uses, a man may limit the use, so as to make his heirs *special* take either by *purchase* or by *descent*. Thus, if J. S. make a feoffment to A. in fee, to the use of himself for life, with remainder to the use of the heirs of his body; this is a good estate tail executed in J. S.⁴ So if the use be limited to A. for life, with remainder to the heirs of the body of J. S., in this case also the heirs of the body will take by *descent*;⁵ for as the limitation of A. for life *may* determine during the

⁴ See a precedent, 1 Horsem. 303 to 307.

⁵ Co. Litt. 3, a. 112, a. *Moyse v. Gyles*, 2 Vern. 385. *Lucas v. Lucas*, 1 Atk. 271, note 2, last ed.

⁶ Co. Litt. 112, a.

⁷ [Not by fine or recovery since the late statute 3 & 4 Will. 4, c. 74.]

⁸ Dyer, 156, a, b. 1 Co. 136, b. 137, a.

⁹ Co. Litt. 22, b

¹ Moor, 720. *Dyer*, 9, pl. 20.

² Co. Litt. 22, b.

³ *Grewold's case*, Dy. 156, a.

⁴ Co. Litt. 22, b.

⁵ See *Wills v. Palmer*, 5 Burr. 2615. 2 Black. 687.

life of J. S. (the grantor), the law implies a use in J. S. for life, expectant upon the determination of the estate of A.; according to the principle, that so much of the use as is not disposed of results to the grantor; and this implied estate in J. S. for life in remainder, is sufficient to consolidate with the limitation to the heirs of his body; pursuant to the rule, that where there is a limitation to the ancestor for life, with a limitation to his heirs, or heirs of the body, in the same conveyance, the heirs, or heirs of the body, do not take by *purchase*, but by *descent*.⁶ But if a feoffment be made to the use of A. and his heirs *during the life of the grantor*, with the remainder to the use of the heirs of the body of the grantor; as the use is expressly limited away during the life of the grantor, there can be no *implied* estate in him, so *as to [*138] consolidate with the limitation to the heirs of his body, and therefore his issue must in that case take by *purchase*.⁷

But a grantor cannot, even under a conveyance which operates by way of *use*, enable his heir *general* to take a remainder as purchaser, under a limitation to his *heirs*; but where the limitation is to the right heirs of the grantor, the use so limited is construed to be the *old* use, and will be executed in him as the *reversion in fee*, and not as a *remainder*.⁸ Thus, if a fine be levied to the use of the wife of the conuzor for life, remainder to the use of another in tail, remainder to the use of the right heir of the conuzor; the last limitation of the use is void as a *remainder*: for the *old* use of the fee continued in the grantor as a *reversion*.⁹ So where a feoffment was made to the use of the feoffor for forty years, without impeachment of waste, and afterwards to the use of C. his second

⁶ See Fearne, 28, et seq. (9th ed.)

⁷ Tippin v. Cosin, Carth. 272. 4 Mod. 380. Else v. Osborne, 1 P. W. 387. See Fearne, 43, (9th ed.)

⁸ See 1 Co. 129, b. 130, a. Godolphin v. Abingdon, 2 Atk. 57. This must be understood with the qualification, that the heir generally may take under a limitation as a purchaser in the shape of a contingent remainder, as a limitation to such person, as at the time of the determination of the particular estates, shall be the right heir. See Marquis of Cholmondeley v. Lord Clinton, 2 Jacob and Walker, 1. [1 Dow. N. S. 299. 4 Bligh, N. S. 1.]

⁹ Fenwick v. Mitford, Moor, 284. 1 Leon. 182. Co. Litt. 22, b. Read v. Errington, Cro. Eliz. 321. S. C. Semb.

son in tail male, with remainder to the use of the right heirs of the feoffor; it was *determined, that the [*139] use limited to the right heirs was the *old use*; that it was void as a *remainder*, and was merely the *reversion*.¹

The difference is material. The grantor taking the limitation to his *right heirs*, as a *reversion*, it is his property, and he may grant or devise it. But if the *right heir* took as a *purchaser*, the *remainder* would belong to him, and the grantor himself would be excluded.²

Sir Francis Bacon has observed, "that the very letter of the statute doth take notice of a difference between an use in *remainder* and an use in *reverter*; which though [*140] it cannot be properly *so called, because it doth not depend upon particular estates, as remainders do, neither did they before the statute draw any tenures, as *reversions* do; yet the statute intends that there is a difference, when the particular use and the use limited upon the particular use, are both *new uses*; in which case it is a use in *remainder*; and where the particular use is a new use, and the remnant of the use is the old use, in which case it is a use in *reverter*."³

(3.) Again: by the common law, generally speaking, no person could take a present interest by the *habendum* of the deed, who was not named in the premises.⁴ But in a case,⁵ where A. enfeoffed B., *habendum* to the said B. and C. their heirs and assigns, to the use and behoof of the said B. and C. their heirs and assigns; it was

¹ Earl of Bedford's case, Moor, 718. 1 Co. 130, a. Cro. Eliz. 334. Har. Co. Litt. note 3, 22, b. Bingham's case, 2 Co. 91, b.

² "Lands granted by A. by fine, for the life of A., remainder to A.'s right heirs. It is a reversion in A., and he may grant it." Note 3, Har. Co. Litt. 22, b. See Jenk. 248, pl. 38, and ante 62, in note.

[By the late act, 3 & 4 W. 4, c. 106, entitled, "An Act for the Amendment of the Law of Inheritance," it is enacted, (sec. 3), "That when any land shall have been devised by any testator, who shall die after the 31st day of December, 1833, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a *devisee* and *not by descent*; and when any land shall have been limited by any assurance, executed after the said 31st day of December, 1833, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a *purchaser*, by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate, or part thereof."]

³ Bac. *Uses*, 45, 46.

⁴ 2 Roll. Ab. 67. Hob. 313, note 4. Har. Co. Litt. 26, b. But see Spry v. Popham, 3 East, 115.

⁵ Samme's case, 13 Co. 55. See as to an *exception* after an estate limited by way of use, Tregmial v. Reeve, Cro. Car. 437.

resolved, that as C. was not named in the premises, he could take no *possession* originally by the *habendum*; and that the livery, made according to the intent of the indenture, did not give anything to C., because as to him it was void; but though the feoffment did not give any *seisin* to C., yet it did to B. and his heir, which *seisin* was sufficient to serve the use declared to C. Therefore the use limited to B. and C. was good, *and the [*141] statute executed it. But this limitation of the use in a bargain and sale to a person not named in the premises, after a previous disposition of it to the bargainer, would be void, for the reasons before mentioned.⁶

(4.) So it is a rule of law, that if an estate be conveyed to two, the one being capable, and the other incapable, at the time of the grant, he who is capable shall take the whole;⁷ and that *joint-tenants* cannot take at different periods.⁸ But since the introduction of uses, if A. make a feoffment in fee, to the use of B. and his wife that shall be; though the whole estate will vest in B. at first, yet upon his marriage the wife shall take jointly with him.⁹ So if a disseisin be had to the use of two, and the one agrees to it at one time, and the other at another, they shall be *joint-tenants*.¹

(5.) No estate of freehold can by the common law be granted to commence *in futuro*,² neither can a contingent remainder be supported without *an express [*142] particular estate of freehold. Therefore, if a grant be made to B. and his heirs to commence four years after the grant, or to A. for years, with remainder to the right heirs of J. S. who is living,³ in either case the grant is void. But if a conveyance be made to J. S. for life, with remainder to the first son unborn, or right heirs, of J. D.; or if a feoffment and livery be made to J. S. for ten years, with remainder to J. D. and his heirs; in these cases the intervening estates are sufficient to support the

⁶ [Because it would be a use upon a use.]

⁷ 1 Co. 100, b. 2. 13 Co. 57. [Woodgate v. Unwin, 4 Sim. 129.]

⁸ Co. Litt. 9, a. 188, a. 12 Roll. Ab. 417, pl. 8.

⁹ Mutton's case, Moor, 96. Dyer, 274, b. 1 Co. 101, a. Samme's case, 13 Co. 57. See Wells v. Fenton, Moor, 634. Stratton v. Best, 2 Bro. Ch. Ca. 233.

¹ Co. Litt. 188, a. 13 Co. 57.

² Barwick's case, 5 Co. 94, b. 2 Vent. 204. Roe v. Tranmer, 2 Wils. 75.

³ Co. Litt. 217, a.

remainders. Now in conveyances to uses, the courts have supported these future limitations, when no particular estate has been created, either in the shape of remainders, or as springing uses.⁴ Thus, if a man covenant to stand seised to the use of the heirs of his own body,⁵ or to the use of another after his own death,⁶ or if he bargain and sell his lands after seven years;⁷ in each of these cases the grant is good, and until the event takes place, the use results. But in conveyances operating by way of transmutation of possession, it is necessary that a present seisin should be transferred in order to serve the resulting use. Thus, if a feoffment, or lease and release, be made to J. S. and his heirs, to the use of J. S. and his heirs, to commence four *years from [*143] thence, or after the death of the grantor,⁸ the limitation of the use to J. S. is good, for during the four years, or the life of the grantor, it will result and be executed. But if the conveyance had been to J. S. and his heirs after the death of the grantor, to the use of J. S. and his heirs, it would have been void, because it is the grant of an estate of freehold to commence *in futuro*.⁹

When a feoffment is made to A. and his heirs, to the use of the heirs of the body of the grantor, the limitation to the heirs of the body takes effect upon the death of the grantor, not as a springing use, but as a remainder; and the use resulting to the grantor for his life by way of particular estate, the grantor, by the union of the particular estate, and the remainder, becomes tenant in tail in possession.¹ If the whole fee had resulted to the grantor, the heirs of his body would have taken as purchasers, by way of springing use: but the decision is formed upon the true construction of the statute of uses; that so much of the use, as the grantor has not disposed of, and no more, results to him.

⁴ See 1 Atk. 586.

⁵ Cart. 263. See 22 Vin. 283, pl. 2, and the cases collected in the note.

⁶ Osman v. Sheafe, 3 Lev. 370. Roe v. Tranmer, 2 Wils. 75. [Goodtitle v. Gibbs, 5 Barn. & Cress. 709.]

⁷ Bac. Uses, 63.

⁸ See 2 Salk. 675, and the above cases.

⁹ Roe v. Tranmer, 2 Wils. 75. Lamb v. Archer, 1 Salk. 225.

¹ 1 Roll. Rep. 240. 22 Vin. 283, and the cases cited in note, pl. 2, and 2 Freem. 235, pl. 307, 258, pl. 326. *Ante*, 101, 102.

But in other cases, not substantially differing, as it appears to me, in principle from the above, *another [*144] construction is said to have been established. In *Davies v. Speed*, 2 Salk. 675, the Chief Justice held, "that a feoffment to the use of A. and his heirs, to commence four years from thence, was good as a springing use, and that the *whole* estate remained to the feoffor in the mean time; so it is, if it were to commence after the death of A. without issue, if he died without issue in twenty years." This doctrine is assumed by others :² but it does not appear to have been considered with any degree of attention. Bacon (63), expressly says, "If I bargain and sell my land after seven years, the inheritance of the use only passeth ; and there remains *an estate for years* by a kind of subtraction of the inheritance ;" and this seems to be the proper construction of the statute.

In the case of *Davies v. Speed*, before noticed, a husband and wife, seised in right of the wife, conveyed by fine and deed to the use of the heirs of the body of the husband on the wife begotten ; and for default of such issue, to the use of the *right heirs of the husband. They had issue, which died in the life-time of the husband and wife. The wife dies ; then the husband dies ; and the question was, whether the limitation to the right heirs of the husband was good ? According to Salkeld's report of this case, it is said to have been determined, first, that no estate for life resulted to the *husband*, because the estate belonged to the wife ; "secondly, this limitation to the *heirs of the body* of the husband, &c. was merely void ; for, taking it as a remainder, there is no precedent estate of freehold to support it ; and taking it as a springing use, then it is a springing executory use to arise after a dying without issue, which the law will not expect."

* See Pollex, 30, in the case of *Weale and Lower*; and the case of *Carwardine v. Carwardine, Fearne by Butler*, 388, 9th ed. [See this case reported in 1 Eden's Rep. 21.] In the case of *Pybus v. Mitford*, 1 Vent. 379, Hale, Chief Justice, says, "So if he covenants to stand seised to the use of J. S. after forty years, there is a fee-simple determinable in the covenantor." This is intelligible ; for till the expiration of the term of forty years, the covenant does not take effect. Until that period, there is not any seisin to a use. See also 1 Leon. 194. [And see *Bengough v. Edridge*, 1 Sim. 252.]

There is a manifest error in this report of the second resolution, by referring to the limitation to the heirs of the body of the husband and wife, instead of the limitation to the right heirs of the husband; for the question was, whether the limitation to the right heirs of the husband was good; and unless the resolution is taken with reference to that limitation, then the observation, "taking it as a springing use, then it is a *springing* and *executory* use to arise *after a dying without issue*," would not have been applicable.

But the conclusion in that case, that the limitation to the right heirs of the husband was void as a springing use, is not very intelligible. A springing use indeed, to [*146] take effect after a general *dying without issue, where it is not preceded by an estate tail in the issue, is, no doubt, illegal; but that was not the case in *Davies v. Speed*. Admitting, in that case, that the use did not result to the wife and her heirs by way of particular estate, so as to support the limitation to the heirs of the body of the husband and wife as a contingent remainder, still the limitation to the heirs of the body might have been good as a springing use, to take effect upon the decease of the husband; and if that limitation had taken effect, there could have been no objection to the limitation to the right heirs of the husband, either as a remainder expectant upon, or as a springing use to take effect after, the estate tail;³ for in either case a recovery by the tenant in tail might have destroyed it; and if the limitation to the heirs of the body did not take effect, then the limitation to the right heirs of the husband must of necessity have taken effect upon his death, and therefore not within the reasons of a perpetuity. The limitation, as it appears to me, to the right heirs of the husband, might, according to the event, have taken effect either as a remainder or as a springing use; and during the life of the husband, or the suspense of the contingency, it was uncertain in which way. If there had been, at the death of the husband, any person answering the description of heir of the bodies of husband

³ The words would have created an estate tail. See *Mandeville's case*, Co. Litt. 26, b.

and wife, such heir could have taken an *estate [*147] tail under the springing use to him, with a vested remainder to the right heirs of the husband; but if there had been no person answering that description at the death of the husband, then the limitation to his right heirs might have been good as a springing use: as a remainder, therefore, to take effect after an estate tail, it would have been good; and it would have been valid as a springing use to arise upon the decease of a person *in esse*.

In the case of *Adams v. Savage*,⁴ where lands were conveyed by lease and release to trustees and their heirs, to the use of A., the releasor, for ninety-nine years, if he should so long live, remainder to the use of the trustees for twenty-five years, remainder to the use of the heirs male of the body of A., it was determined that no use for life resulted to A., and consequently, that the remainder to his heirs male was void, there being no freehold estate previously limited to support it.

If the above limitations had been in a will, instead of a deed, the limitation "to the heirs male of the body of A." would have been good, as *an executory devise*,⁵ and there does not appear to be any satisfactory reason why that limitation, in the case cited, should not have been supported as a springing use. But it is singular [*148] *that the court did not, either in this case or in the case of *Rawley v. Holland*,⁶ consider the limitation upon the doctrine of springing uses: they determined that the limitation was void, as a remainder; but they did not, it should seem, advert to the circumstance, that it might have been good as a springing use.⁷

Probably the fact is, that at the time when the cases of *Adams v. Savage*, and *Rawley v. Holland* were determined, the limitation, in each of those cases, "to the heirs male of the body," was considered as too remote, even if it had been an *executory devise* under a will: in

⁴ 2 Salk. 679. Lord Raym. 854.

⁵ *Harris v. Barnes*, 4 Burr. 2157. *Gore v. Gore*, 2 P. W. 28.

⁶ 22 Vin. 189, pl. 11.

⁷ Sergeant Hill, in a MS. note to *Adams v. Savage*, Salk. 679, makes a query, "If this would not be as good as a springing use, as it would in a will be a good executory devise."

the one case, the limitation being to take effect after a life in being, and a term of twenty-five years; and in the other, after a life in being, and a term of 200 years: for it does not appear to have been settled until the case of *Gore v. Gore*⁸ (1722), that the *freehold* might become vested under an executory devise, although such freehold estate were preceded by a term of 200 years, or upwards. The case of *Adams v. Savage* was determined in 1701, and *Rawley v. Holland* in 1712.⁹

[*149] *(6.) It is a maxim of the common law, that no estate can be limited upon a fee-simple; or in other words, an estate in fee-simple cannot be made to cease as to one, and take effect by way of limitation, upon a contingent event, in favour of another person. Thus, if a feoffment had been made in fee, with a proviso to make it cease as to the feoffee, and go over to a stranger upon the payment of a certain sum, &c., this limitation ^{was void.}¹ For as a remainder it [*150] could not take effect; a remainder being a *remnant* of an estate in lands or tenements expectant upon

⁸ 2 P. W. 28. [*Sidney v. Miller*, Coo. 211.]

⁹ [In the case of *Carwardine v. Carwardine*, reported 1 Eden, p. 34, Lord Chancellor Northington observes, "I do not myself recollect any case where a springing use was ever introduced in the middle of a limitation; but it always comes in afterwards, and determines the first gift in fee, whether that gift be made of a fee to one person, or composed of a particular estate and remainders; and wherever it happens to arise, it displaces the first gift, and changes the uses in favour of other persons." If this view be correct, there is a distinction between executory devises and springing uses; and the limitations in *Gore v. Gore*, (2 P. Wms. 28,) after the determination of the term, could never be sustained as springing uses.

With respect to the question, whether upon a conveyance to the use of A. and his heirs after a term of years, the use results to the grantor for the term only, or in fee, the balance of authority is in favour of the latter alternative. Indeed, there appears to be no decided case in which it has been held that a use results to a grantor in more than two ways, namely, for his own life, or in fee: and if in the case supposed a term only should result, there would be equal reason for supporting a limitation by way of use to one and his heirs, on failure of the heirs of the body of the grantor, without an express antecedent use to the grantor and the heirs of his body, (a limitation generally admitted to be bad,) on the ground that the grantor took an estate tail by resulting use. Moreover, if the estate were held to vest in the grantor for the term only, this consequence would follow, that if the grantor died during the term, his executor might recover in ejectment against the heir; a result inconsistent with that leaning in favour of the heir which is attributed to the law. The phrase "by a kind of subtraction of the inheritance," cited from Bacon, is peculiar, and at least ambiguous; it does not seem inapplicable to an estate *descendible to the heir* for a limited term. See *Sidney v. Miller*, Coo. 206. See also Sugden's edition of *Gilbert on Uses*, p. 165, in note.]

¹ See Co. Litt. 18, a. *Seymour's case*, 10 Co. 97, b. 1 Salk. 231, pl. 9. Dyer, 33, a. 1 Co. 85, b. 10 Mod. 423. Plowd. 29.

a particular estate;³ and as a condition it was void, for no person can take advantage of a condition but the grantor and his heirs.⁴ But it is established now beyond controversy, that limitations of the above nature may take effect by way of use.

The principle seems to have been acknowledged at a very early period. In Brooke's Abridgment,⁵ it is admitted, that if a man make a feoffment in fee to the use of W. and his heirs, until A. pays a certain sum to W., and then to the use of A. and his heirs; the use is first executed in W. by the statute; but when A. pays the money, the use upon such payment shifts from W., and vests in A. But in that case (which was determined before the rule was clearly settled, that all future or springing uses must be served out of the seisin of the grantees,) it was said, that, to avoid all doubts, A. should enter in the name of the feoffees, and in his own name.

So where a fine was levied to the use of A. and his heirs, if R. should not pay a certain sum to A. at an appointed time, and if he should, then to *the [*_151] use of A. for life, remainder to the use of R. in fee; upon the payment of the money it was held, that the uses would change according to the limitation.

It seems, that a shifting or springing use, after a previous limitation of the fee, cannot be barred by the cestui que use by any kind of conveyance. Thus, if land be given to the use of A. and his heirs, until B. pay him 10*l.*, and then to the use of B.; A. cannot bar this contingent use.⁶ A contingent, or shifting use, in this respect differs from a contingent remainder, which may be destroyed: but it agrees with an executory devise after a previous devise of the fee, as it was determined in *Pells v. Browne*.⁷ However,⁸ if a man covenant to stand seised

³ Co. Litt. 143, a. See *Fearne*, 11, 9th ed.

⁴ *Doctor and Stud.* Dial. 2, c. 20, 21. *Perk.* s. 831. Litt. s. 347.

⁵ *Bro. Feoff. al. Uses*, pl. 30, cites 6 Ed. 6, B. N. C., pl. 423.

⁶ See *Spring v. Caesar*, 1 Roll. Ab. 415, pl. 12.—For other instances of springing uses after a previous limitation of the fee, I must refer to the cases of *Harrowell v. Lucas*, Moor. 99, and *Earl of Kent v. Steward*, Cro. Car. 358.

⁷ *Lloyd v. Carew*, Prec. Cha. 72. Pig. Rec. 134. Palm. 132, 135. Vide *Bro. Feoff. al. Uses*, pl. 50, B. N. C. 137.

⁸ *Wood v. Reignold*. Cro. Eliz. 764, 765, 854. Cases collected in note to pl. 4. 22 Vin. 225, and pl. 1, 224. See also *Gilb. Uses*, 125.

to the use of himself in fee until marriage, and then to the use of himself and his intended wife and the heirs of his body, with remainders over; he may before marriage destroy the future or contingent uses, by making a feoffment in fee, in tail, or for life, upon a good consideration, [*152] and without *notice; but a lease for years would not destroy it, although it would bind the future use.^{*}

We may reconcile the last case to the preceding rule in this manner; if the seisin, out of which the springing or future use is to arise be destroyed, the future use cannot take effect: therefore, if A. covenant to stand seised to the use of such a wife as he shall hereafter marry, until the marriage the use results to himself in fee, and it is out of his seisin that the use to the wife must arise: now, if he destroy that seisin before the use comes *in esse*, the use consequently cannot be served.¹ But if A. make a feoffment to B. in fee, to the use of C. in fee; but if D. pay so much money, then to A. in fee; here, if C. (who has the legal estate since the statute) make a feoffment, suffer a recovery, or levy a fine, the use to A. is not barred from taking effect; because that shifting use is served out of the seisin of B., the feoffee, and not out of the estate of cestui que use. But it appears to me, that if in this case B. (the feoffee) should join with C. in making a feoffment, the seisin, or *scintilla juris*, of B. would be completely destroyed, and in that case no future use could arise to A. Indeed, if it is admitted that there is a possibility of seisin remaining in the feoffee, to serve the contingent uses, it will follow that it may be destroyed by release or feoffment.

[*153] *Brent's case² was in effect thus: R. B. made a feoffment to the use of himself and D., his wife, for their lives, with remainder, if R. B. survives D., to the use of such woman as R. B. should afterwards marry, for her jointure; remainder to the use of J. S. in fee.

J. S. and the feoffees, with the consent of R. B., join

^{*} See *Bould v. Wynston*, Cro. Jac. 168. *Sed contra, semb. Barton's case, Moor. 742*, as to the lease for years.

¹ The case in *B. N. C.*, 187, which is *contra*, is denied to be law. 2 Sid. 98.

² 17 Eliz. 2 Leon. 14. *Dyer*, 339, pl. 48.

in a feoffment to other uses; and then R. B. levies a fine to the same uses, and marries a second wife.

The question was, whether the contingent use to the second wife was not destroyed by the feoffment of J. S. and the first feoffees? It appears, that the point was not judicially determined: but in *Dillon v. Freine*, Poph. 76, Anderson says, “And for Brent’s case, I have always taken the better opinion to be, that the wife cannot take in the case for the mean disturbance, notwithstanding the judgment, which is entered thereupon, which was by the assent of the parties:” and in *Woodliff v. Drury*,⁸ which was the case of a feoffment before marriage, to the use of the feoffor and his intended wife after the marriage, and the heirs of their bodies (no use having been limited until the marriage); all the justices held, “that although the feoffor be seised in fee until the marriage, yet by the marriage the new use shall arise, if there be no act in the meantime to destroy the future use, as in Chudley’s case.”

*The argument in Perrot’s case⁴ appears to me [*154] very satisfactory; “a disturbance, which will impede the future use, ought to arise on the part of the feoffees; as if an alien is enfeoffed to a use,⁵ upon office found, the use is destroyed per 11 Regin. Dyer, fol. 283, in the case of the King *v. Jasper*; or if one who had committed treason or felony is enfeoffed to uses, and afterwards is attainted, the use is destroyed:⁶ and that was the case of *Francis Throckmorton*, who was attainted for treason in the 26th Eliz.: he was conuzee in a fine to the use of Mrs. Scudamore, his sister, for her jointure, and that was after the treason committed, but before the attainder; and after his attainder, his sister sued to the queen, who granted to her the land by the advice of *Monsieur Plowden, et divers autres de grand learning in le ley.*”

“So if the feoffees, before the future use shall arise, disable themselves from being seised of the land by their feoffment; as in Chudley’s case.”

⁸ Cro. Eliz. 439.

⁴ Moor. 368, 390, 391, pl. 506. ‘36, 37 Eliz.

⁵ Bacon, *Uses*, 59.

⁶ Ib. 58, 59.

"And so 17 Eliz. Dyer, 340, (*Brent's case*,) where the use was limited to such woman as he should marry, and before marriage he requires his feoffees to make another feoffment over: in these cases the future use is prevented (*prevent*) by the opinion of the greater part of the judges who argued the case of *Dillon v. Freine*."

*"And so it seems, if the feoffees had been [*155] barred of seisin by collateral warranty, or the like."

(7.) It is a maxim of the common law, that every remainder must be limited, so as to await the determination of the particular estate, before it can take effect in possession.⁷ Therefore, if an estate be limited to a person in tail, or for life, with a condition for making it cease upon an event which may happen before its regular determination, this condition is void: for it cannot operate as a remainder, for the reason just stated; and as a condition to vest the subsequent limitation by the entry of the grantor, it can have no effect; for supposing the grantor to enter for a condition broken, such entry would avoid the first livery, and of course destroy the remainder, which was created by that livery. But it is now clear, that if a seisin in fee be limited to J. S. to the use of A. in tail, or for life, provided that if B. return from Rome, then the lands shall remain to the use of C. in fee; the limitation to C. will vest in abridgment of the estate limited to A.⁸

It appears to me, however, that limitations of the nature just mentioned, which operate so as to determine the preceding particular estate, before its regular expiration, can be effected without the aid of springing or shifting uses, and that by a species of limitation, which [*156] is not properly a *remainder, nor condition, but which is distinguished by the name of a *conditional limitation*:⁹ an expression and idea, as Mr. Douglas has in my opinion properly said,¹ originally adopted to evade the necessity of the entry by the heir for the purpose of taking advantage of the defeazance of a prior

⁷ Plowd. 24. Fearne, 14, 261, 262, (9th ed.) *Cogan v. Cogan*, Cro. Eliz. 360.

⁸ See 2 Leon. 16.

⁹ See Reeves, vol. iv. 509, 510. Plowd. 27, 32, 34, 414.

¹ Dougl. Rep. 727, note 1. See Shep. Touch. 150.

estate. In order to distinguish between spring uses and conditional limitations, I must observe, that, where the grantor parts with the whole fee, and limits the use upon the seisin so transferred to B. in tail, or for life, until C.'s return from Rome, and then to the use of C., &c.; this limitation to C. is termed a springing or shifting use. But where the grantor only parts in the first instance with an estate less than the fee, the estate so created may be defeated by a *conditional limitation*; and upon the determination of it, the next subsequent estate immediately become vested without entry or claim.³ But in these cases it is necessary to use the words of limitation; which words⁴ are, *quamdiu, dummodo, dum, quounque, durante*: whereas, words of *condition* are, *sub conditione, ita quod, si contingat, proviso*. If words of *condition* are inserted, then the particular estate cannot cease without entry by the grantor or his heirs.

Thus, if there be tenant for life, with remainder in fee, upon *condition* that tenant for life (being a *feme sole) should continue unmarried, and she afterwards marry; though the heir of the grantor may enter, yet by such entry he defeats the remainder.⁵ But if an estate be granted to A. *so long as* she shall continue unmarried,⁶ or to A. *for life, si tam diu in pura viduitate viveret*,⁷ and the remainder to be granted to B.; upon the marriage of A., her estate determines by the nature of its limitation, and the remainder to B. immediately takes effect.⁸ So if a gift be made in tail *to A., upon [*158] *condition*, that if C. return from Rome, it shall

³ Co. Litt. 214, b.

⁴ W. Jones, 58. See also Plowd. 29.

⁵ Co. Litt. 214, b.

⁶ See 2 Black. Com. 155. W. Jones, 58, in *Foy v. Hynde*, 5 Vin. 63, pl. 13, and note. Mr. Fearne considers the limitation over as a *remainder*, and not as a *conditional limitation*, p. 428, 9th ed.

[According to Fearne, the true point of distinction between such conditional limitations over, as are, and such as are not remainders, in the strict sense of the word, is this: the former are limited to commence when the first estate is by the very nature and extent of its original limitation to expire or determine (of which the case in the text is an instance); whereas, the latter are limited so as to be independent of the measure or extent originally given to the first estate, and to take effect in possession upon an event which may happen before the regular determination to which the first estate is liable from the nature of its original limitation, and so as to rescind it. And he adds, that conditional limitations are so called to distinguish them on the one hand from conditions, of

⁸ Mary Portington's case, 10 Co. 41.

⁶ W. Jones, 58.

thenceforth immediately remain to B.; in this case the limitation over can never take effect as a remainder; because the estate tail cannot cease without an entry by the grantor or his heirs, which entry would defeat the remainder.⁸ But if a feoffment be made to A. and the heirs of his body *until* C.'s return from Rome, and after C.'s return, to B. in fee; here, upon C.'s return, the limitation to B. will vest.⁹

But when limitations operate by way of shifting or secondary uses, they take effect whether the words which cause their taking effect be words of *limitation* or *condition*.¹ Thus, where a fine was levied to the use of B. in fee, *upon condition* that he should pay A. (who was the conuzor) 4*l.* per annum, and in default of payment to the use of A. for life; it was said, that as this was limited to the conuzor, it was a *condition*; but if it had been limited to a stranger, it would have been a good [*159] *springing use* upon the non-performance of "the condition." To prove this, the case of Bracebridge was cited,² which so far as relates to the present point was, that A., seised of the reversion of some lands, granted them to B. and C., and their heirs, *upon condition* to pay a certain sum on a particular day; and in default thereof to stand seised to certain uses. Default was made in payment, and it was held, that by virtue of the statute 27 Hen. 8, c. 10, the use was divested out of the grantees.

which only the grantor, or his heir, can take advantage; and, on the other, from remainders, in the strict and proper sense of the word.

But though limitations of a certain description are by some considered to be within the definition of a remainder, whilst others distinguish them as conditional limitations (which may be regarded as a mere difference of nomenclature), there is no dispute as to the test of their validity: if they are limited to commence when the preceding estate determines by the very nature of its limitation (as in the instance given in the text), they may be valid even in conveyances at common law; but a limitation to take effect in possession, upon an event which may happen before the first estate determines by the nature of its original limitation, can only be good in wills or conveyances to uses.]

¹ Co. Litt. 214, b. W. Jones, 58. Plowd. 413.

² W. Jones, 58. Sed vide Shep. Touch. 121, contra. But the authorities there cited do not support his position.

¹ See 2 Leon. 16.

² Smith v. Warren, Cro. Eliz. 688.

³ Moor. 99, pl. 243. S. C. by the name of Harwell v. Lucas, 1 Leon. 264, pl. 355. S. C. 2 Leon. 221, pl. 281, and 113. S. C. 22 Vin. 251, H. a. pl. 3, and note.

Where an estate is limited to the use of A. in fee-simple, subject to a springing use, no act of A. can destroy it, as I have before observed; but where an estate tail is limited, and a secondary or shifting use is limited upon it, the tenant in tail may by recovery bar the limitation over.⁴ Therefore, it is said, "If tenant in tail be with a limitation so long as such a tree shall stand, a common recovery will bar that limitation."⁵

*(8.) I have noticed such shifting or springing [*160] uses as take effect, or arise, upon an event provided for by the deed, in which the original limitations, intended to be defeated thereby, are created. But there is a species of shifting or future use, which arises from the act of some agent or person nominated in the deed; and this is called a use, arising from the execution of a *power*. Every power of this kind is a power of revocation, and new appointment; for the new uses and estates created under the appointment, must necessarily (as to the extent of such appointment) revoke, defeat, or abridge the uses, which existed, and were executed, previously to the new limitation.⁶ Sometimes an express power of revocation is limited prior to the power of appointing new uses. But this is never necessary.

Powers of appointment are adopted under various circumstances, and they may either by the express provision of the deed precede, or be reserved after, the limitation of uses intended to be executed subject [*161] to such powers.(a) Thus an *estate may be con-

⁴ *Page v. Hayward*, 2 Salk. 570. *Vide 1 Lev. 35. 1 Sid. 102.* See *Fearne*, 428 (9th ed.) [Recoveries have been abolished by the stat. 3 & 4 Will. 4, c. 74; but the observations in the text will equally apply to the mode of assurance substituted by that act.]

⁵ In the case of *Benson v. Hodson*, 1 Mod. 111.

[Where a secondary or shifting use is limited upon a prior estate which is void, the secondary or shifting use will not be accelerated, but will fail also. See *Robinson v. Hardcastle*, 2 T. R. 241. 2 Bro. C. C. 22. *Beard v. Westcott*, 5 Barn. & Ald. 802. *Lomas v. Wright*, 2 Mylne & Keene, 775. So where preceding limitations by appointment under a power are void, subsequent limitations, though within the power, are also void. *Routledge v. Dorril*, 2 Ves. J. 357. But where the subsequent limitation of the use would take effect as a remainder, and not by way of secondary or shifting use, it seems that the use would result during the prior void estate only, and that the subsequent limitations would take effect. *Carrick v. Errington*, 2 P. W. 361. 5 B. P. C. 391.

⁶ See 2 Vern. 511. *Moor*. 611.

(a) See *Miller v. Priddon*, 16 Jur. 588; *In re Hutchinson's Trusts*, 17 Jur. 59.

vveyed to J. S. and his heirs, to such uses as A. shall appoint, and in default of appointment, and subject thereto, [*162] to the use of A. and his heirs.⁷ But it is immaterial⁸ whether the power actually precedes, or comes after, the limitation of the use to A. and his heirs. In a case⁹ where an estate was limited to the use of H. R. and his heirs, *and* to such uses as he should appoint

⁷ An appointment under a power of this kind would overreach the claim of the wife of the appointor to dower. See *Ray v. Pung*, 5 Barn. & Ald, 561.

[In the case of *Doe dem. Wigan v. Jones*, 10 Barn. & Cress. 459, it was held that where an estate had been limited to such uses as A. B. should appoint, and in the meantime to A. B. for life, &c., a judgment which had attached on the estate limited to A. B., was defeated by an appointment under the power. But now by the act 1 & 2 Vic. c. 119 (ss. 11, 13, & 19), a judgment registered as therein mentioned is made a legal lien and also an equitable incumbrance upon all estates over which the party against whom it is entered up has any *disposing power*, exercisable without the assent of any other person for his own benefit. However, by the subsequent act 2 & 3 Vic. c. 11, s. 51, no judgment, although duly registered, is to have any greater effect as against purchasers and mortgagees, without notice, than it would have had previously to the first-mentioned act; and by the still later act, 3 & 4 Vic. c. 82, s. 2, the judgment must be registered, to affect a purchaser or mortgagee even with notice. Thus, in order to prevent an appointment from having the effect ascribed to it in *Wigan v. Jones*, there must be both registration of the judgment and notice of it to the party taking under the appointment. Neither the registration alone, nor the notice alone, would be sufficient. Notice, however, may be proved by slight circumstances. On this point see *Jones v. Smith*, 1 Hare, 43, and the cases there cited.

Under the act 3 & 4 Will. 4, c. 105, the ordinary limitations in bar of dower would be ineffectual in the case of a widow who had been married subsequently to the 1st of January, 1834, the husband having made no disposition in his lifetime, or by his will: but such a widow will not be entitled to dower out of any land absolutely disposed of by her husband in his lifetime, or by his will (s. 4); nor out of any land of the husband where in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land (s. 6). In consequence of the provisions of this act, the old dower uses will be gradually abandoned; but it will be desirable still to retain the limitation to such uses as the purchaser shall appoint, owing to the effect of an appointment under this power in defeating judgments entered up against the purchaser.

There is no analogy with respect to this operation of the appointment, between a Judgment debt and a Crown debt. The ground of the decision in *Wigan v. Jones* was, that a judgment is a proceeding *in invitum*; a voluntary charge would operate either in exercise or in derogation of the power *pro tanto*. Now, in the case of the crown, it is the debt itself, and not the proceeding by which payment is enforced, that creates the charge upon the land. This is by the common law, *per cursum scaccarii*, which makes the law in such cases. See the *Attorney-General v. Sir Geo. Sands*, Hardres, 496. Even land over which the crown debtor has a mere power of revocation for his own benefit, may be extended for the debt by virtue of the royal prerogative. Sir Ed. Coke's case, 2 Roll. 294. See also the acts 33 Hen. 8, c. 39, and 13 Eliz. c. 4, the former giving to obligations and specialties to the crown the effect of a statute staple, (which was a voluntary security for a debt, binding on the debtor's lands under 27 Edw. 3, c. 9). But now by statute 2 & 3 Vic. c. 11, s. 8, a debt due or liability incurred to the crown *after the passing of that act*, does not bind a purchaser or mortgagee unless it be indexed in the Court of Common Pleas.]

⁸ See 4 Term. Rep. 181.

⁹ *Dobbins v. Bowman*, 3 Atk. 408.

by will, Lord Hardwicke thought, that the word *and* must be understood disjunctively for the word *or*, in order to comply with the intention of the parties. But if a feoffment, or lease and release, be made to *J. S. and his heirs, to the use of J. S. and his heirs, [*163] with a power of revocation reserved thereupon, such power is void: because J. S. is in by the common law.¹

In conveyances to purchasers, the estate is sometimes conveyed to the purchaser and his heirs, to such uses as he shall appoint by deed or will, and in default of, and subject to, such appointment, to the use of the purchaser and his heirs. It is conceived that a power of appointment so reserved cannot be exercised; for, subject to the power, the purchaser is *in* by the common law; and it does not appear to me, that the reservation of the power before the limitation to the purchaser, can make any difference between this and the case stated by Sir Edward Coke. A modern writer,² to whom the profession is indebted for several valuable works, seems to think, that in this case, in order to preserve the power, and to effectuate the intention of the parties, the releasee would be deemed to be in under the statute of uses. It would be difficult, however, to support that construction either upon principle or authority.

That upon a conveyance to A. and his heirs, to the use of him and his heirs, A. would take in *the [*164] course of possession by the common law, and not by the Statute of Uses, is a point, I apprehend, settled beyond controversy.³ In *Gwam and Ward v. Roe*,⁴ a reversion was conveyed by fine to the conuzee and his heirs, to the *use* of the conuzee and his heirs; and the conuzee brings debt against the lessee: and it was objected, that no attornment of the lessee was alleged, as it ought to have been, "because the plaintiff came in by the common law, and not by the Statute of Uses—*quod fuit concessum*."

In the case of *Lord Altham v. the Earl of Anglesey*

¹ Co. Litt. 237, a. Shep. Touch. 525. [And see *Doe v. Passingham*, 6 Barn. & Cress. 305.]

² Sugd. on Pow. vol. i. 162, 6th ed.

³ [See *Doe v. Passingham*, *ubi supra*, accordingly.]

⁴ *Salk.* 90. *Ante*, 89, 90.

(*Gilb. Rep.* in Ch. 17), it is expressly stated, that if a fine be levied to a man and his heirs, to the use of him and his heirs, in this case he shall take by the common law, and not by way of use: and the same doctrine is stated in *Long v. Buckeridge*, 1 Strange, 111, and by *Bacon*, 63.

The seisin transferred to the grantee being clothed with the limitation of the use, there was no ulterior equitable interest known previously to the Statute of Uses: for the conveyance to the grantee gave the possession to him at the common law, and the declaration of the use to him invested him with the most extensive beneficial interest then existing. Any ulterior limitation or declaration of a use, or trust, is an equitable interest, *arisen from the construction upon the [*165] Statute of Uses. It is not the use which existed previously to that statute.

The question therefore is, whether a power of revocation and new appointment can operate upon a legal estate perfected at the common law? The authority of Sir Edward Coke is decisive:⁶ "In case of a feoffment or other conveyance, whereby the feoffee or grantee is *in* by the common law, such a proviso were merely repugnant and void." The author of the *Touchstone*,⁶ by way of illustration of the case stated by Coke, says, "As where A. doth enfeoff B. and his heirs, to the use of B. and his heirs:" but the writer to whom I have alluded seems to think that Coke had no such case in contemplation, but alluded to a feoffment at common law, and not by way of use. If there be any meaning at all in the observation, he could have contemplated no other case. If a feoffment be made to A. and his heirs, it is necessary, in order that he may obtain the legal estate at the common law, that there should be either a declaration of the use to him, or a consideration paid by him to prevent a resulting use to the grantor; so that although a grantee may still have a legal estate at the common law, the rule is grounded upon the practice and construction of uses; and it is to be presumed that Sir Edward

⁶ *Co. Litt.* 237, a.

* 525.

Coke, who, in the case *stated, was explaining [*166] the operation of the Statute of Uses, understood the principles upon which a legal estate was created at the common law.

It is however contended, that the grantee having the use partially limited to him, may, in some cases, take the legal estate by the statute, and not at the common law; that this construction is adopted to give effect to the intention of the parties; and that the principle of construction may be extended to the case under consideration. If indeed intention is to be allowed at all upon the construction of a deed, it must be confined to those cases where the grantee to uses takes only a joint or partial estate under the limitation, the remaining use being limited to a third person; for in these cases, the use being limited to a certain extent to a third person, the words of the statute are satisfied; and courts of justice may possibly, in such cases, think it proper to mould the whole limitation under the statute, so as to meet the intention of the parties. But if a conveyance be made to A. and his heirs, to the use of him and his heirs, it can never be a question of intention, whether A. takes a legal estate by the statute, or at common law. He takes it at the common law by a positive rule of law, not raised from intention, but operating sometimes even against it, as in the case of a conveyance unto, and to *the use of* A. and his heirs, to the use *of B. and [*167] his heirs, in trust for C. and his heirs; in which the intention of the grantor would be manifest, that B. should take the legal estate, for otherwise he could not be a trustee for C.; yet clearly the legal estate would vest in A.; and it would, no doubt, be the same, notwithstanding the grantor had by a subsequent declaration expressed his intention that B. should take the legal estate. In truth, this and the case stated by Sir Edward Coke appear to me to be grounded upon the same established rule;—that a use cannot be limited to arise out of the estate of a cestui que use, taking the legal estate at the common law; that a use cannot be limited upon a use, although the first use, being limited to the grantee,

is not a use within the statute;⁷ and the two cases cannot in principle be distinguished. In the one case, the estate is conveyed to and to the use of A. and his heirs, to the use of B. and his heirs; and in the other, to and to the use of A. and his heirs, subject to a power of appointment reserved to B.; and if, in the case first mentioned, the use to B. cannot be executed in consequence of the seisin of A. being clothed with the use limited to him, upon what principle can the appointee of B. in the second take a legal estate? Upon what rational distinction can the appointee acquire a legal estate under the limitation, effected by the exercise of the power, when, if the same limitation had been included in the deed [*168] itself, *he would merely have taken an equitable interest?⁸

I anticipate an observation upon this mode of reasoning. It may be said, that if a conveyance be made unto (not to the use of) A. and his heirs, to the use of B. and his heirs, to the use of C. and his heirs, although the use to C. being limited by the same conveyance, cannot be executed by the statute, because it is limited to arise out of the estate of *cestui que use*, yet by the exercise of a power of appointment reserved by the conveyance, the appointee may take a legal estate. The rule of law would be correctly stated; but the application of it to the case which I have mentioned would be erroneous; for by the exercise of the power, the use would arise out of the seisin of A., not previously clothed with a use. The analogy would be preserved by stating the case thus: If in a conveyance to A. and his heirs, to the use of B. and his heirs, a power of appointment is reserved [*169] either to A. or B., but so worded *that the use to take effect under the exercise of the power is to arise out of the legal estate of B., and not out of the

⁷ See this point before stated, 89.

⁸ [The distinction drawn by Sir Edward Sugden is this: In the first case, the use being vested in A., the use to B. is a use upon a use, and therefore void; in the last case, A. takes a seisin and a use, but the use is subject to the power, and is during the existence of the power executed *sub modo* only; that is, subject to open and let in the estate created under the power. When the power is executed, the use appointed takes effect as if properly limited in the deed creating the power; therefore the use arises out of the original seisin of A., and defeats instead of deriving its essence from the use limited to A. See Sug. Powers, vol. i. p. 166, 6th ed.]

seisin of A., the appointee under the power would not take a legal estate, because the use limited to him would arise out of the estate of B., the *cestui que use*. What difference can be discovered between the limitation of a use under a power to arise from the estate of *cestui que use* having the legal estate by the statute, and from the estate of *cestuique use* having the legal estate at the common law?²

*In most modern marriage-settlements, powers [*170] of selling and exchanging are limited to the leasees; and powers of leasing,¹ jointuring,² and limiting terms for raising portions for younger children,³ are reserved to the tenants for lives. All these powers by whatever words they are created, take effect by way of limitation of the use out of the original seisin of the feoffees, or releasees.

Powers of leasing were frequent soon after the Statute of Uses. In a case, 42 Eliz.,⁴ a power of leasing is mentioned as a common thing; and it is there said, that the words usual in such powers were *to make leases or demise* for twenty-one years, or three lives; which words should be understood to limit the use; and that if a lease should

*[Sir Edward Sugden, in his work upon Powers, combats the above arguments, and comes to a different conclusion from the author. In the 6th edit. (*Sug. Pow.*.) vol. i. p. 168, Sir Edward Sugden, after stating his opinion, "that in the case under discussion the statute would be attracted, and consequently the power would be good," proceeds to say, that since these observations were published it has been decided, that "the power is, in the disputed case, well raised;" and for this he refers to *Moreton v. Lees*, C. P., Lancaster, March Ass., 1819: case reserved and argued before Lord Chief Baron Richards and Mr. Baron Wood, at Serjeant's Inn. Under all the circumstances, Mr. Sanders did not consider that the case of *Moreton v. Lees* amounted to a conclusive and satisfactory settlement of a point which has been open to so much doubt, and the subject of so much discussion. Time has, however, now lent its sanction, and added authority to the case: for the decision has remained in force, and appears never to have been judicially questioned, down to the present period. That the opinion of Sir Edward Coke, whose authority is so much relied on in the text, was in favour of the view advocated by the author, is by no means clear. In Co. Litt. 248, a. the following case is cited from Dyer, 13 Eliz. fol. 298, 299. Tenant in capite maketh a feoffment in fee to the use of *feoffee* and his heirs, until the feoffor pay 100*l.* to him or his heirs; the feoffee dieth, his heir within age: the king hath wardship of the body and the land: but if the feoffor pay the 100*l.*, the wardship is divested both for the body and the land. Neither Coke nor Dyer could have regarded this case as one of a common law condition; for the former adds, "and so it is in case of a condition;" and the latter expressly states, that upon payment, the feoffee and his heirs should stand seized to the use of the feoffor and his heirs. Neither is it the case of a conditional limitation, since the feoffor had parted with the whole fee. See p. 157, ante.]

¹ See the form, Appendix III.

² Appendix IV.

³ Appendix V.

⁴ Moor, 611. See *Leaper v. Wroth*, cited 6 Co. 33, a. Cro. Eliz. 5, 1 Leon. 35.

be made in the words of a *demise*, it should ensue as a limitation of the use for the term. It is observable, that the most early precedents of leasing powers enable the [*171] party to **lease* or *demise*,⁵ but the lease being nothing more than a limitation of the use, the words authorising it should be *limit and appoint* by way of lease or demise; and yet the old form of leasing powers is in this respect still preserved in the most approved modern precedents. I find, however, among Bridgeman's precedents, several powers of this kind, in which the words *limit and appoint* are expressly used.⁶

Sir Edward Coke states,⁷ that powers of revocation in voluntary settlements were frequent in his time. Thus, if a man seised in fee, for the advancement of his blood, covenanted to stand seised to the use of himself for life, with remainder over, he would annex a power of revoking those uses. These powers, however, when reserved to the grantors or owners of estates, were, like the voluntary conveyances in which they were reserved, made fraudulent as against purchasers, by the 27th Eliz. c. 4.⁸

[*172] General *powers of revocation have been long since disused in settlements, because, even when

⁵ See West's Symb. s. 275. 1 Leon. 35.

⁶ See 2 Bridg. Conv. 12, 17, 98, &c. So also as to powers of jointuring, Ibid. 14, 17, &c. ⁷ Co. Litt. 237, n.

⁸ "And be it further enacted by the authority aforesaid, that if any person or persons have heretofore, sithence the beginning of the queen's majesty's reign, that now is, made, or hereafter shall make, any conveyance, gift, grant, demise, charge, limitation of use or uses, or assurance of, in, or out of any lands, tenements, or hereditaments, with any clause, provision, article, or condition of revocation, determination, or alteration at his or their will or pleasure of such conveyance, assurance, grants, limitations of uses or estates of, in, or out of the said lands, tenements, of hereditaments, or of, in, or out of any part or parcel of them contained or mentioned in any writing, deed, or indenture of such assurance, conveyance, grant, or gift; (2.) and after such conveyance, grant, gift, demise, charge, limitation of uses, or assurance, so made or had, shall or do bargain, sell, demise, grant, convey, or charge the same lands, tenements, or hereditaments, or any part or parcel thereof, to any person or persons, bodies politic and corporate, for money or other good consideration paid or given (the first conveyance, assurance, gift, grant, demise, charge, or limitation, not by him or them revoked, made void, or altered according to the power and authority reserved or expressed unto him or them in and by the said secret conveyance, assurance, gift, or grant;) (3.) that then the said former conveyance, assurance, gift, demise, and grant, as touching the said lands, tenements, and hereditaments, so after bargained, sold, conveyed, demised, or charged against the said bargainees, vendees, lessees, grantees, and every of them, their heirs, successors, executors, administrators, and assigns, and against all and every person and persons which have, shall, or may lawfully claim anything, by, from, or under them, or any of them, shall be deemed, taken, and adjudged to be void, frustrate, and of none effect by virtue and force of this present act." See Shep. Touch. 64.

restrained by the consent of trustees, it has been doubted whether they are not within the provision of that statute.⁹ A power was then introduced into settlements, whereby the prior uses were revoked, in "case the grantor" [*173] should *first* settle other lands of equal value to the same uses. This power, as Mr. Booth observes,¹ was found inconvenient, because few people are in circumstances to buy new estates, till they have sold their old ones. The modern power of selling and exchanging, which is reserved to the releasees, answers every purpose.²

So early as the time of Bridgeman's practice, a doubt seems to have prevailed as to the priority and effect of powers of the above kind with reference to each other, when contained in the same settlement; and he therefore introduced a clause³ in settlements, declaring, "that every of the said jointures, leases, grants, limitations, and estates, shall take effect and stand good, according as the said jointures, leases, grants, limitations, and estates, shall in priority of time be made, one before the other, by force of any of the powers or provisoës aforesaid." The qualification, however, so far as I have been able to ascertain, appears to have been subsequently omitted in most approved forms; thereby leaving the effect of the powers to the construction of law: but of late years it has not been unusual to insert a proviso, declaring, 1st, that the power of *leasing shall [*174] take precedence of the power of selling and exchanging, unless executed subsequently to it, in point of time; 2dly, that the power of selling and exchanging shall overreach every other power, although subsequently exercised in point of time; and 3dly, that in all other

⁹ See 2 Bat. Ab. 607, and Boller v. Waterhouse, T. Jones, 94. 3 Co. 82, b. [The cases cited appear to establish this distinction, that where the party whose consent is required is evidently nominated by and under the influence of the settlor, and such consent consequently amounts to no real check upon the exercise of the power, the case is within the statute; but not so, where the imposition of the restraint is a bona fide and substantial one. And see Lavender v. Blackstone, 3 Keb. 526, 752.]

¹ See opinion at the end of Hill, Shep. Touch.

² See Appendix VI.

³ 1 Bridg. Conv. 219. See 2 Bridg. Conv. 18, 102. [On the question of priority of powers, see Sug. Pow. vol. ii. 46, 6th ed. See also Bringloe v. Goodson, 4 Bing. N. C., 726.]

cases, the powers shall take effect according to the exercise of them in priority of time.

Considering the nature and objects of powers of leasing, jointuring, charging for younger children's portions, and selling and exchanging, I cannot satisfactorily discover the necessity or propriety of any explanatory declaration as to their priority; and it is to be feared that these clauses have tended to create doubts where none ought to have existed, and even to raise an erroneous opinion as to the effect of appointments made under the powers; for certainly it cannot be considered as an invariable rule, that, in the absence of an express declaration, the uses to arise under the execution of the powers will take effect according to the priority of execution.

The powers of jointuring and charging for younger children's portions are introduced with a view to benefit the immediate objects of the settlement, by making a provision for those claiming under them as wives, or children. By the exercise of the power of leasing, or of selling and exchanging, the use is limited to a purchaser, who is not an immediate object of the settlement. The [*175] uses *limited under the exercise of the former powers must be considered as limitations originally contained in the settlement, for the benefit of the objects of it; but the estates created by the latter must necessarily, as to the extent of such estates, overreach the limitations of, and virtually supersede, the settlement itself.

The avowed object of a power of selling is to enable the donee of it to convey to a purchaser a title complete against the immediate objects of the settlement, and those claiming under them either as volunteers, or upon the consideration of marriage.

If a sale or exchange, made under the execution of a power, revokes a jointure or provision for younger children, made by the settlement itself, it must, for the same reason, overreach a jointure or provision created by the exercise of a power contained in such settlement. There is no rational distinction between the cases. In each, the jointure or charge will be secured upon the estate to

be purchased or acquired in lieu of the estate sold or exchanged. Then with reference to the powers in each of the two classes above mentioned : first, when powers are reserved to a tenant for life, of leasing, selling, and exchanging, and of charging, not as a provision for younger children, but for raising a sum of money for his own use, the use or estate appointed by either of these powers would vest in the appointee *in possession ; and no subsequent act of the tenant for life could defeat his own previous appointment in favour of a purchaser. If the subsequent could defeat the previous appointment, the appointee under the previous appointment would not take an estate in possession, according to the express purport of the appointment.⁴ Secondly, if powers of jointuring and charging for younger children's portions are reserved to a tenant for life, the priority of the execution of the uses under those powers should be determined by the usage in limiting those estates by the settlement itself, by which the presumed objects of the parties may be inferred ; and therefore a jointure under a power should precede a charge made by the same tenant for life for younger children's portions, notwithstanding the latter may be executed previously in point of time : and although the jointure be made upon a second, and the charge created upon a first marriage.

Admitting the propriety of expressly declaring the intention of the parties, both of the qualifications which I have above noticed are imperfect and erroneous. The following plan seems less objectionable : in the power of sale, the releasees, or the tenant for life, may be empowered to revoke the uses limited by the settlement, and which may be limited by the exercise of any of the powers therein contained, except any lease made *under the power of leasing, and subject and without prejudice to any sale or mortgage which shall then have been actually made in consequence of the exercise of any of the powers ; and in the power authorizing the tenant for life to charge for younger children's portions, it should be expressly stated, that the charge

⁴ See *Goodright v. Cator*, Doug. 477.

made under the power should be subject to the jointure limited by virtue of the power of rejoining reserved to the same tenant.

With respect to the different kinds of powers, and the means of destroying or suspending them, the following observations occur.

Powers are either appendant, or in gross, or altogether collateral;⁶ appendant, when the exercise of them is in the first instance to interfere with, and, to a certain extent, to supersede the estate of the donee of such power; in gross, when they do not commence until the determination of the estate of the donee; and collateral, when the donee has no estate at all in the property which is the subject of the power.

A power reserved to a tenant for life, to make leases in possession, is appendant; for by the exercise of it, the term created by it necessarily precedes the estate of the tenant for life, to whom it is reserved. A power to a [*178] tenant for life to *jointure is a power in gross; for the jointure created by it must necessarily take effect after the death of the particular tenant.

Where an estate is limited to the use of A. for life, with remainders over to other persons, and with a power of revocation and new appointment reserved to A., this power is both appendant and collateral. It is appendant as to the estate for life of A., and collateral as to the estates in remainder. So, if the use had been limited to A. for life, with remainder to B. in tail, with remainder to A. in fee, with a power of revocation and new appointment reserved to A., the power would be appendant as to the estate for life of A. and his remainder in fee, but collateral to the estate tail of B.

A power wholly collateral is reserved to a person having no legal estate in the property settled: as where an estate is limited in strict settlement, and a power is reserved to a stranger to revoke to existing uses, and limit new ones.

The division of powers into three classes above mentioned is adopted in practice, and is sufficient for all pur-

⁶ [Sug. on Pow. vol. i. p. 43, 6th ed.]

poposes. But the distinctions are not critically accurate; for all powers are in truth in some degree collateral; and the distinction has been raised rather to denote the person exercising the power, than the estate made subject to it, and to arise under its execution. Thus, a power *reserved to a tenant for life to make leases in possession, although appendant to his own life estate, is collateral to the estate of the person next in remainder, so far as it arises out of such remainder. The terms therefore "appendant," and "in gross," arise from, or in consequence of, the estate of the person exercising the power; and the term "collateral," in respect of the estate acted upon by the power.

In practice, the cases of greatest interest arise upon the destruction of these powers; and it is necessary to attend to the above observations, in order to understand the grounds upon which powers may be destroyed, or rendered impossible to be exercised.

With respect to powers, so far as they are appendant, it may be considered as a principle, that the donee of a power shall not be allowed, by the exercise of such power, to defeat any charge, estate, or incumbrance, which he himself had previously made or created; and therefore, if a tenant for life, having a power of leasing, previously conveys his legal estate, the power of leasing, to the extent of such conveyance, will be defeated.⁶ So, in the case mentioned of an estate *being limited to A. for life, with remainder to B. in tail, with remainder to A. in fee, with a general power of revocation reserved to A., if A. by lease and release, not executed according to the forms required by the power, convey to C. in fee, he cannot afterwards exercise his power as to his own life estate, and his remainder in fee; but the power will remain as to the estate tail of B.

So, the usual power of appointment limited to a purchaser to prevent the dower of his wife from attaching upon the estate, must be considered as a power append-

⁶ [Where a tenant for life, with power of leasing, grants a term of years by virtue of his estate, the utmost effect of this demise is, that the power of leasing is suspended, so far as regards the lease and interest of the grantees: see Bringloe v. Goodson, 4 Bing. N. C. 726.]

ant. And therefore, if the purchaser afterwards convey the fee by lease and release, or any other conveyance, without having had recourse to the power, the power is extinguished.⁷

In *Ren, lessee of Hall v. Buckley*, Doug. 292, 2d ed., it was held, that if a tenant for life convey his legal estate for life merely for the purpose of letting in a particular charge, this will not destroy a power of leasing previously reserved to him.⁸ *But the authority [*181] of this case has been doubted. So, where a tenant for life, with a power appendant, conveys his life estate, and the old use is limited to him, the power, it should seem, is not destroyed.

It has been mentioned, that if there be tenant for life, with a power to make a jointure on an after-taken wife, or to make a lease for years, to commence from his death, for the purpose of raising portions for his younger children, the power, in each of these cases, is in gross. "These powers," says Lord Hale,⁹ "may by apt words be destroyed by *release*, or by a fine or feoffment,¹ which carry away and include all things [*182] relating *to the land : but an assignment of *totum*

⁷ [As to the effect of bankruptcy or insolvency on a power in gross vested in the bankrupt or insolvent, see *Badham v. Mee*, 7 Bing. 695. 1 Mylne & Keen, 32, S. C. *Hole v. Escott*, 2 Keen, 444. 4 Mylne & Craig, 187. *Jones v. Winwood*, 10 Sim. 150.]

⁸ [Sugd. Pow. vol. i. 58, 6th ed., and the older editions of that work. In the subsequent case of *Crawford v. Rankin* (or *Long v. Rankin*), the judgment in which is reported in Sugden on Powers, vol. ii. p. 539 (6th ed.), it was held, under the circumstances, that a power of leasing given to a tenant for life might be legally exercised by him, notwithstanding he had conveyed away his life estate. And see *Hole v. Escott*, 4 My. & Cr. 187, and the cases there cited. The result of these cases appears to be, that although the power is not extinguished, it cannot be exercised in derogation of a previous conveyance of the estate to which the power is appendant, at least without the consent of the alienee. In *Long v. Rankin* it was expressly stipulated in the conveyance from the tenant for life, that it should be lawful for him to exercise his power of leasing; and if the power could be exercised (as it was held it might be) under such a stipulation, there seems no reason why it might not also be exercisable with the concurrence of the alienee given subsequently to the conveyance to him.]

For various points on the construction of powers of leasing, the student is referred to *Doe dem. Douglas v. Lock*, 2 Adol. & El. 705. *Rogers v. Humphreys*, 4 Adol. & El. 299. 11 Adol. & El. 403. *Dayrell v. Hoare*, 12 Adol. & El. 356. *Rutland v. Doe dem. Wythe*, 5 Mee. & Wels. 688.]

⁹ See *Edwards v. Slater*, Hard. 410, 416. *Penne v. Peacock*, Ca. Temp. Talb. 41.

¹ So by recovery, *Saville v. Blackett*, 1 P. W. 777. Note—the power in that case is erroneously called *collateral*; whereas, according to the distinction before mentioned, it was in *gross*.

statum suum, or other alteration of the estate for life, does not affect such power." Therefore, if a tenant for life convey by lease and release, or bargain and sale *in fee*, he does not destroy a power *in gross* reserved to him: for it is the nature of these conveyances to pass only what the tenant might lawfully convey.

In 2 Roll's Abr. 263, pl. 2, it is said, that if an estate be limited to A. for life, with remainders over, and with a power for A. to revoke the uses and limit new ones, and if A. make a lease for life, the power, as to the fee, is suspended. (*Snape v. Turton*; and see *Clarke v. Phillips*, 1 Vent. 42. Carth. 24. 2 Keb. 552). Hence it has been inferred, that if the tenant for life, in a similar case, convey his life estate by lease and release, or bargain and sale, such conveyance will suspend or defeat the power. But the authorities cited do not warrant this conclusion. They go only to this extent: that if A., tenant for life, with a power of revocation and new appointment, make a lease for *life*, the lease would suspend the exercise of the power of revocation; and this determination may be supported, I apprehend, upon principle; for it may be assumed, that the lease was made for the life of the lessee, and not of the lessor; and it may be assumed that the lease was made by feoffment, which was at that time the usual mode of conveying the *freehold* by way of lease. Now the lease might continue, in point *of duration, beyond the life of [*183] the lessor, and being made by feoffment, it may be considered as having displaced the reversion, out of which the use to be created by the power was to arise. But it is different if A. by bargain and sale, lease and release, or grant at common law, conveys his life estate; for neither of these conveyances displaces the estates in remainder.

With respect to a power collateral; as where a feoffment is made in fee by A. to uses, with a proviso that if B., a stranger, shall revoke, the uses shall cease, the donee of the power cannot release it, and a fine levied or feoffment made by him will not extinguish it: for the person to be benefited under the exercise of the power does not claim the estate from or under the donee, but

under the original settlor. But if the donee of the power in this case should acquire the fee-simple of the estate, the power would become unnecessary, and would be consequently extinguished.

But when a collateral power, as a power of selling and exchanging, is reserved to the releasees or grantees to uses, there is supposed to be a *scintilla juris*, or possibility of seisin, remaining in them to serve the use arising under the execution of the power: and it should seem that the power may be defeated by the previous release or extinguishment of the possibility of seisin. The destruction [*184] of this *scintilla juris* occasioned one of *the objections to the title in *Wheate v. Hall*:² for Sir Martin Foulkes, to whom the legal estate was devised by the will of Maximilian Western, jointly with Charles Callis Western, was surviving releasee to uses under the settlement of 1793, and he joined in conveying the legal estate to the uses of the settlement of 1805.³

In the case of *Willis v. Shorrall*,⁴ Lord Hardwicke held, that a power vested in a stranger to limit a term of years for raising a sum of money upon a certain event, could not be destroyed by a fine levied by the person who claimed the lands subject to the power; and indeed, it may be stated as a general rule, that the destruction of a power, if it be capable of being destroyed, must proceed from the donee of it, and not from the owner of the estate subject to its operation; for it would be absurd that the act of the person, whose estate is to be overreached by the exercise of the power, and not being the donee of it, should be competent to destroy a power, which, in its original creation, was intended to supersede such estate. This seems to be clear in principle; but Holt, C. J. in *Page v. Hayward*, 2 Salk. 570, having [*185] *stated generally his opinion, that a recovery will bar a condition or limitation collateral to the estate tail, for the destruction of which it is suffered, it has

² 17 Ves. 80.

³ [In *Roper v. Halifax* (post, 186,) the releasees to uses under the settlement of 1788, joined in the conveyance to the uses of the deeds of the 20th and 21st December 1811; but the power of selling and exchanging reserved to them by the settlement of 1788 was, under the circumstances, held *not* to be thereby destroyed.]

⁴ 1 Atk. 474.

been contended, that a recovery will destroy a power originally reserved with a view to defeat such estate tail. But a recovery has the effect of barring a collateral condition or limitation, on the principle that it bars all remainders expectant upon it; but it cannot affect a use precedent to the estate tail, of which the recovery is suffered; for the recoveror comes in, as of the estate of the tenant in tail, and subject to all charges to which it is subject, and to all limitations preceding it.

The fallacy of the argument consists in considering the springing use under a power, as a limitation or remainder determining or narrowing the limits of the estate tail: but the use arises upon the exercise of the power by the effect of, or under, the original settlement. For instance, if instead of creating a lease or jointure under the power, the lease or jointure had been created by the settlement, it would be clear that a recovery by a tenant of an estate tail subsequent to the lease or jointure, could not destroy such lease or jointure.

Every power, so far as it is collateral, takes effect as a springing use under the conveyance by which the power is reserved, superseding, or overreaching, the estates to which it is collateral. It *does not properly determine an estate, like a remainder or [*186] conditional limitation, but it substitutes another estate in lieu of it. Suppose lands limited to the use of A. for life, with remainder to B. in tail, remainder to C. in fee, subject to a proviso, that if a certain act be done within the compass of A.'s life, the uses limited to B. and C. should cease, and in lieu thereof the use should be to D, in fee: it could scarcely be contended, that any act by the tenant in tail could defeat this springing use. It would not, in the sense in which the expression is used, determine the estate tail of B., but it would prevent its taking effect in possession. It would substitute another estate, in lieu of the estate tail. A use taking effect under a power to be exercised by A. is, in substance, the same thing.

The late case of *Roper v. Halifax*,⁵ determined in June 1817, in the Common Pleas, has confirmed the

* [Reported also in 8 Taunton, 845.]

above observations. In that case, by indentures of lease and release, dated the 7th and 8th March, 1788, (being articles executed previously to the marriage of Miss Catherine Castle with Edward Bouverie, Esq.), it was agreed, that certain freehold estates in Suffolk, Miss Castle's property, should be conveyed by her to John Thomas Batt and Everard Fawkener, Esqrs., their heirs and assigns, to the uses following; (viz.) to the intent that [*187] the said Catherine Castle, during the joint *lives of herself and the said Edward Bouverie, might receive a rent-charge of 300*l.* by way of pin-money; and subject thereto to the use of Frederick Robinson and John Crewe, their executors, &c. for a term of ninety-nine years for securing it: with remainder to the use of the said Edward Bouverie for his life; with remainder to the use of the said J. T. Batt and E. Fawkener, and their heirs during his life, to preserve contingent remainders; remainder to the use of the said Catherine Castle for her life, with remainder to the use of the same trustees during her life to preserve contingent remainders; remainder to the use of Edward Vincent and John Blake, their executors, &c. for a term of five hundred years, for raising portions for the younger children of the intended marriage; with remainder to the use of the first and other sons of the intended marriage successively in tail male; with remainder to the use of the said Edward Vincent and John Blake, their executors, &c. for a term of six hundred years, for raising additional portions for daughters in case of failure of issue male of the intended marriage; with remainder to such uses as the said Catherine Castle should appoint; with remainder to the said Catherine Castle in fee. And in the same indenture of release it was further agreed, "that in the said intended settlement there should be contained a power for the said J. T. Batt and E. Fawkener, or the survivor of them, or the heirs or assigns of such survivor, at any [*188] time or times, by and with the consent and *ap- probation of the said Edward Bouverie, and Catherine Castle, his intended wife, or of the survivor of them, to be testified in manner last therein before directed," [viz. by any deed or deeds, writing or writings

under their hands and seals, or his or her hand and seal, to be executed in the presence of, and to be attested by, two or more credible witnesses,] "from time to time to sell or exchange all or any part of the manors, hereditaments, and premises, in the county of Suffolk, so agreed to be settled and limited as aforesaid;" so as that the money to arise from the sale thereof should be laid out in the purchase of, and that the exchange should be made for, other manors, &c.; and so as all the hereditaments and premises, so to be purchased and taken in exchange, should be immediately thereupon conveyed to the same uses, as the hereditaments sold or exchanged were by the intended settlements to be limited and settled. And by the same deeds the said Catherine Castle conveyed the same estates to the said J. T. Batt and E. Fawkener, to the use of the said C. Castle and her heirs until the marriage; and then to the use of the said J. T. Batt and E. Fawkener, their heirs and assigns; upon trust, when the said Edward Bouverie (who was then a minor) should make the settlement of his estates therein agreed upon to convey and settle the said estates thereby conveyed to the uses before stated. And in the said indenture of release is contained the usual power of appointing new trustees, by the said Edward Bouverie and Catherine Castle.

*By indentures of lease and release, dated the [189] 21st and 22d November, 1788, (being the settlement made in pursuance of the above articles,) Mr. Bouverie duly conveyed his estates to such uses as were agreed upon by the articles. And in the indenture of release of the 22d November, 1788, the trustees conveyed Mrs. Bouverie's estates to the uses agreed upon by the articles; subject to the following powers of selling and exchanging: "Provided always, that it shall and may be lawful to and for the said J. T. Batt and E. Fawkener, or the survivor of them, or the heirs or assigns of such survivor, with the consent and approbation of the said E. Bouverie and Catherine his wife, or of the survivor of them, to be testified in manner hereinbefore directed," [viz. by any deed or deeds, writing or writings, under their hands and seals, or his or her

hand and seal, to be executed in the presence of, and to be attested by, two or more credible witnesses,] "from time to time to sell or exchange all or any part of the manors, hereditaments, and premises, in the said county of Suffolk, in and by these presents settled and limited as aforesaid; so as that the money to arise from the sale thereof, be laid out and invested in the purchase of, and that the exchange be made for, manors, freehold messuages, lands, and hereditaments, and copyhold or leasehold messuages, lands, or hereditaments, which may be near to, or be intermixed with, or be proper and convenient to be held and enjoyed with the freehold hereditaments and premises so *to be purchased or taken [^{*190}] in exchange; but so that the copyhold or leasehold hereditaments and premises, so to be purchased or taken in exchange as aforesaid, do not exceed one-fifth part of the value of the entire hereditaments and premises to be so purchased and taken in exchange; and so as all the hereditaments and premises so to be purchased and taken in exchange be immediately thereupon conveyed, settled, limited, and assured, to the same uses, upon the same trusts, and for the same intents and purposes as the hereditaments and premises which shall be so respectively sold or exchanged as aforesaid, are in and by these presents limited and settled as aforesaid." With the usual declaration, that the receipts of the trustees should be good discharges to purchasers, &c.

By indentures of lease and release, dated 1st and 2d March, 1804, Mr. and Mrs. Bouverie, in pursuance of their power, duly appointed Robert Blake, Esq., to be a trustee in the room of Mr. Fawkener, who was then dead; and by the same indentures, and by indentures of lease and release, dated 3d and 4th March, 1804, (indorsed on the release of 2d March, 1804,) all the trust estates were duly conveyed to the said J. T. Batt and Robert Blake and their heirs, to the uses and upon the trusts of the settlement of November, 1788.

[*191] By indentures of lease and release, dated the 28th and 29th June, 1811, the release being made between the said Edward Bouverie of the first part: Everard William Bouverie, his eldest son, of the

second part: William Ainge, of the third part; and Richard White, of the fourth part; after reciting that the said Edward Bouverie and Everard William Bouverie were desirous of destroying the estates tail created by the settlement of 1788, and of settling the estates therein comprised (subject to the estates then existing therein previous to the estate tail of the said Everard William Bouverie,) to the uses after mentioned; it is witnessed, that for barring the estate tail, &c., the said Edward Bouverie did grant, release, and confirm to the said William Ainge and his heirs, during the joint lives of the said Edward Bouverie and William Ainge (amongst other estates,) the said estates in the county of Suffolk; to hold to the said William Ainge and his heirs during such joint lives, to the intent that the said William Ainge might become tenant to the præcipe in a common recovery, in which the said R. White was to be demandant, and the said Everard William Bouverie, vouchee. And it was thereby agreed, that such recovery, when suffered, should enure "to the several uses which, under or by virtue of the said indentures of lease and release of 21st and 22d days of November, 1788, were immediately previously to the sealing and delivery of these presents, or the lease for a year on which the same was grounded, subsisting or capable of taking effect in the said hereditaments, antecedent *to the uses by [*192] the aforesaid indenture of the 22d day of November, 1788, limited to the first and other sons of the said Edward Bouverie by the said Catherine his wife, severally and successively, according to their respective seniorities, in tail male: and to the further use, that all and singular the trusts, powers, exemptions, and privileges, upon or to the said several uses charged, annexed, relating, collateral, or limited to any person or persons seised of, or entitled to, the same, might still accompany the said several uses, and be vested in, and belong to, and be exercised by, the persons seised of, or entitled to, the same uses, or in whom the same powers were vested; to and for the end, intent, and purpose, and so as that the said several uses, trusts, powers, exemptions, and privileges, might by these presents, and the recovery to

be suffered in pursuance thereof, be to all intents, effects, constructions, and purposes, established, or continued, and corroborated, or confirmed. And after the expiration, or sooner determination, of the said several uses, and in the meantime subject thereto, and subject to the several powers, and to the uses or estates to be created thereby," to such uses as the said Edward Bouverie and Everard William Bouverie should appoint; and in default of such appointment to the use of the said Everard William Bouverie in tail male, with remainder to the use of the said Edward Bouverie in fee.

[*193] In Trinity Term, 51 Geo. 3, a recovery was *duly suffered, in pursuance of the last-mentioned indentures.

By indentures of lease and release, dated the 20th and 21st December, 1811, the release being made between the same Edward Bouverie, of the first part; the said Everard William Bouverie, of the second part; the said John Thomas Batt and Robert Blake, of the third part; the Rev. John Bouverie, of the fourth part; Henry Bouverie, Esq., and the said William Ainge, of the fifth part; the Honourable Philip Pleydell Bouverie and John Dorrien, Esq., (trustees duly appointed in the room of the said Edward Vincent and John Blake, both deceased,) of the sixth part; and the Right Hon. John, then Lord Crewe, (in the settlement of 1788 called John Crewe, Esq., and who had survived the said Frederick Robinson, his co-trustee,) of the seventh part; it is witnessed, that pursuant to, and in execution of, the power and authority of the said Edward Bouverie and Everard William Bouverie for that purpose given, by the said indenture of release of the 29th June, 1811, and such recovery, and of every other power or authority, the said Edward Bouverie and Everard William Bouverie did thereby appoint that the said estates in the county of Suffolk should (but subject, and without prejudice, to the uses, estates, and powers, in and by the same indenture of release limited and raised, or established and confirmed, antecedently to the joint power of appointment thereby given and *reserved to the said Edward Bouverie and E. W. Bouverie) be and re-

main to the uses therein after declared. And it was further witnessed, that for a nominal consideration, the said J. T. Batt and R. Blake, according to their several estates and interests, did bargain, sell, and release, and the said Edward Bouverie and E. W. Bouverie did grant, release, and confirm, unto the said John Bouverie and his heirs, all and singular the said estates in Suffolk, to hold the same (but subject, and without prejudice, as appears in the now stating indenture) unto the said John Bouverie, his heirs and assigns, to the uses thereafter declared. And it was thereby declared, that as well the limitation and appointment, as the grant and release thereinbefore contained, should severally enure to the following uses; viz., to the intent that the said Catherine Bouverie might, during the joint lives of herself and the said Edward Bouverie, receive thereout the rent-charge of 300*l.* provided for her by the settlement of 1788; and subject thereto, to the use of the said John Lord Crewe, his executors, &c., for the term of ninety-nine years, to commence from the date of the said indenture of the 22d November, 1788, by way of continuation, corroboration, and confirmation of the term of ninety-nine years thereby limited; and also by way of continuation, &c. of the trusts thereby declared of the same term; with remainder to the use of the said Edward Bouverie for his life; with remainder to the said J. T. Batt and R. Blake, and their heirs, *during [*195] his life, to preserve contingent remainders; with remainder to the use of the said Catherine Bouverie for her life, by way of corroboration of the estate limited to her by the said settlement of 1788; with remainder to the use of the same trustees, during her life, to preserve contingent remainders; with remainder to the use of the said Philip P. Bouverie and John Dorrien, their executors, &c., for the term of five hundred years from the decease of the survivor of the said Edward Bouverie and Catherine his wife, by way of continuation, corroboration, and confirmation of the term of five hundred years limited by the said settlement of the 22nd November, 1778, and also by way of continuation, &c. of the trusts thereby declared of the same term; with remainder to

the use of the said Everard William Bouverie for his life; with remainder to the use of the said J. T. Batt and R. Blake, and their heirs, during his life, to preserve contingent remainders; with remainder to the first and other sons of the said Everard William Bouverie successively, in tail male; with divers remainders over in strict settlement. And in the said indenture a new power of sale and exchange of the above estates is reserved to the said J. T. Batt and R. Blake.

In order to decide whether the powers of sale and exchange, contained in the settlement of 1788, were destroyed by the deeds and recovery of 1811, an action of [*196] assumpsit was brought in *the court of Common Pleas, Robert Roper, gent., plaintiff, and Thomas Halifax, Esq., defendant, for not performing a contract for the purchase of the estates in question. The cause was tried at the Westminster sittings in Easter term, 1816, before Mr. Justice Dallas; when a verdict was found for the plaintiff; subject to the opinion of the Court of Common Pleas on a special case.

The first point reserved and stated in this case for the opinion of the Court is not material to the present purpose.

The second point was, "Whether the power of sale contained in the settlement of November, 1788, was destroyed by the recovery of 1811?" If not,

"3rdly, Whether the power was not released, and at an end, by the settlement of December, 1811? If not, whether a good title could be made to the defendant by the plaintiff and Mr. and Mrs. Bouverie and their trustees, under an exercise of the power of sale in the settlement of 1788, and also of the power of sale contained in the settlement of December, 1811; or under one of those powers." If the Court should be of opinion that a good title could be so made, then the verdict was to be entered for the remainder of the purchase-money: if not, a non-suit was to be entered.

[*197] *On the 16th of June, 1817, Gibbs, Chief Justice of the Common Pleas, delivered the opinion of the Court. In stating the case, his lordship said,

"By the operation of all the deeds, and estates,⁶ powers, and trusts, created by the original deed of 1788, are excepted out of the deed of 1811." And after stating the opinion of the Court on the first point reserved, his lordship proceeded thus :

"Secondly. Whether the power of sale in the settlement of 1788 is destroyed by the recovery of 1811 ?

"To determine this, we must consider the nature of the power ; by whom, and for whom, it is to be exercised.

"It is a naked authority, to be exercised by trustees for the benefit of those who take under the settlement, chiefly with the assent of Mr. and Mrs. Bouverie.

"It is antecedent to the estate tail.

"The proposition of the defendant is, that the recovery by Mr. Bouverie and his son, with the consent of Mrs. Bouverie, destroys this power. This is contrary to justice, and the intent of the settlors.

*" It lies on the defendant to establish this on [*198] principle, or authority. He does neither.

"The effect of a recovery is to destroy all remainders, &c. dependent on the estate tail. This is a power which must act on the land, before it become subject to the estate tail, by substituting other land in its place.

"It is against all justice, that the tenant in tail should destroy the power, without the concurrence of the parties interested. Therefore the power is undisturbed by the recovery.

"Then it is said, that if the recovery did not destroy it, it was destroyed by the deeds of December, 1811, in which the trustees joined and were granting parties. .

"We much doubt, whether a power of this sort could be destroyed by the trustees. It is a naked authority, for the benefit of others. But we are clear that it has not. The deeds of 1811 operate as an execution of a power, and an appointment by Bouverie and his son under that power. But, by the terms of the deed, they act only on so much of the estate as attended and followed the estate tail. By the terms of the deed, all previous to the estate tail is left untouched.

⁶ [This word "estates" does not appear in Taunton's Report.]

[*199] “They remain on the operation of the deed of 1788; and the trustees retain their authority under that deed.

“Third. Whether a good title, &c.

“It is not necessary to say more on the power of 1811 because we are of opinion, that under the deed of 1788, there remains to the trustees full authority; and we are of opinion that a good title may be executed by the trustees. And if these are the questions upon which our opinion is required, we are of opinion the plaintiff is entitled to recover. And we do not mean to intimate, that there are any other points in the case to prevent his recovering.” Judgment was accordingly given for the plaintiff.⁷

When powers of selling, exchanging, or making partition are reserved to be exercised by trustees, having a seisin to uses, or having no interest at all, it is usual to insert powers authorizing the appointment of new trustees in the room of the original trustees, in the event of death or incapacity. There can be no doubt, that, by the mere appointment of the new trustees, they may be invested with the powers of selling, &c., without any ulterior act; but in practice, questions frequently arise upon the construction of powers of this kind.⁸

*Having explained the nature of powers in general, and the manner in which they may be destroyed or suspended, I shall defer the further consideration of them to a subsequent part of this work, when I shall examine the deed or instrument by which powers are executed.

It is scarcely necessary in this place to repeat, that all future and shifting uses arise out of the estate of the feoffees, releasees, &c., and not out of the estate of cestui que use: for if a future use be limited out of the estate of the latter, it would in fact be the limitation of a use upon a use; which the law will not permit.⁹ It follows, that no springing use can be limited upon a bargain and sale: for the use cannot arise out of the estate of the

⁷ See the opinion given on this case before it came into Court, Appendix, No. VII.

⁸ See Appendix, No. VIII.

⁹ 1 Co. 136, b. 137, a. Co. Litt. 271, b.

bargainee, he being merely a *cestui que use*; nor can it arise out of the original *seisin* of the *bargainor*; for after the *bargain* and *sale*, there can be no possibility of *seisin* remaining in him. But this I shall explain more fully hereafter. As to powers of *leasing*, they can neither be reserved upon a *bargain* and *sale*,¹ nor upon a covenant to stand *seised*:² for the consideration in the latter conveyance can only extend to the *covenantee*, and those of his blood, and not to a *lessee*. But general powers of revocation may be reserved upon a covenant to stand *seised*.³

*(9.) Springing uses, whether arising under the provisions of a settlement, or by the exercise [*201] of powers reserved in it, and when they are to defeat an estate in *fee-simple*, are confined to the limits of time prescribed by courts of justice for preventing *perpetuities*. If an estate be limited to A. in *fee*, subject to be defeated in a certain event by a springing use in favour of B. and his heirs; or if an estate be settled to uses in strict settlement, subject to a power of selling reserved to a stranger and his heirs, and not capable of being barred or destroyed by the owner of the estate,⁴ the springing use, in either case, must be limited to arise within the compass of a life or lives in being, and twenty-one years after;⁵ or perhaps, in the case of a posthumous child, within a few months longer.

But the doctrine of *perpetuity* is not applicable to springing uses which determine an estate *tail*, in the nature of a condition subsequent; for the first tenant in *tail* in possession may by recovery bar the entail, and all remainders and collateral limitations expectant upon it, and acquire the **fee-simple*: as where an estate [*202] is limited to A. for life, with remainder to B. in

¹ Poph. 81.

² Mildmay v. Standish, Moor. 144.

³ See Shep. Touch. 524; post, vol. ii.

⁴ See Ware v. Polhill, 11 Ves. 257.

⁵ [In Bengough v. Edridge, 1 Sim. 173, the limitations of the inheritance of an estate were suspended during the lives of twenty-eight persons and the survivor of them, and a gross term of twenty years. The legal estate, it must be observed, was vested in trustees in *fee-simple*; but the case was decided by analogy to what the Vice-Chancellor considered to be clearly settled with respect to springing uses and limitations by way of devise. And see post, p. 206, n. (4.)]

⁶ [See the Earl of Scarborough v. Doe dem. Lumley, 3 Adol. & El. 897, cited *supra*, p. 132.]

tail, subject to a provision, that if B. shall not within a certain period assume, and continue to use, a particular name, the estate shall remain to C. in fee. A recovery by B. will defeat the limitation to C.

So, where an estate is settled to uses in strict settlement upon A. for life, with remainder to his first and other sons successively in tail, with remainder to B. for life, with remainder to his first and other sons successively in tail, with other remainders of a similar kind, with a power of selling and exchanging reserved to the releasees, and the survivor of them and the heirs of the survivor, to be exercised with the consent of the tenant for life or in tail, for the time being, in possession; here, if the first tenant in tail acquires the possession before the power is exercised, and suffers a recovery, the power is extinguished; and therefore the power in this case is not within the reason of a perpetuity.'

⁷ *Goodwin v. Clarke*, 1 Lev. 35. "And as to the creating of the term, it is said, that a term may as well be created to arise upon a failure of issue male, as a power to sell on the failure of issue male, which hath been adjudged good in the case of *Vincent v. Lea*, in Moor. Rep. 147. 3 Cro. 26. 1 Leon. 285. 3 Leon. 108. Co. Litt. 113, a. And as to the objection of a perpetuity, it is nothing; for the son, who had the estate precedent, might bar it by a common recovery." [See *Biddle v. Perkins*, 4 Sim. 135, where a power of sale was held to be valid, upon the ground, as it is presumed, mentioned in the text. So also *Powis v. Capron*, 4 Sim. 138, note. *Waring v. Coventry*, 4 Sim. 150, note. 1 My. & Keen, 249. *Sugden on Powers*, vol. ii. 492, (6th ed.) It seems to be by no means clear that every power of sale, however unrestricted, which *may be* executed within the proper limits, is not valid to the extent of any such execution. *Boyce v. Hanning*, 2 Cro. & Jerv. 334. *Wood v. White*, 4 My. & Cr. 460.]

From these principles a practice has arisen in cases of strict settlement, to direct, that, during minority of each tenant for life or in tail, being an infant, the surplus rents and profits should be accumulated for some particular purpose; for the first tenant in tail, of age, acquiring the possession, may by recovery destroy the trusts for future accumulations: but since the late cases of *Lord Southampton v. Marquess of Hertford*, 2 Ves. & Beames, 54, (1813,) and *Marshall v. Holloway*, 2 Swanst. 432, (1818,) it seems advisable to restrain the generality of these trusts. [See *Ibbetson v. Ibbetson*, 10 Sim. 495. The following observations upon the case of *Lord Southampton v. Marquess of Hertford*, are by the late Mr. Saunders. "With the utmost deference to the opinion of so great a judge as Sir William Grant, I consider this case as an authority for sanctioning a refined distinction, instead of a decision establishing a principle and settling the law. It is not easy to discover the ground of the decision, but it is to be observed that the term of 1,000 years preceded the limitations in tail; and it seems to be inferred, that a recovery by tenant in tail, subject to the term did not destroy the preceding trusts of the term. If this be the case, there is great fallacy in the inference; for the trusts of a term created for the purposes of a settlement, must follow the ultimate devolution of the inheritance, and not the inheritance the trusts of the term. A recovery by tenant in tail would acquire the fee-simple, and render the term attendant on the inheritance, discharged of the trust for accumulation."]

It is said in the case of *Washbourne v. *Downes*, [*203] 1 Cha. Ca. 23, that "A perpetuity is where, if all that have interest join, yet they cannot bar or pass the estate;" and in the case of *Scattergood v. Edge*, 1 Salk. 229, "that every executory devise is a perpetuity so far as it goes; i. e., an estate unalienable, though all mankind join in the *conveyance." But these definitions [*204] of a perpetuity are not accurate. If an estate be limited to the use of A. and his heirs, but if B. should die without heirs, of his body, then to the use of C. and his heirs, the limitation to C. and his heirs would be void, as tending to a perpetuity. Yet C. might no doubt, release or pass his future estate; and with the concurrence of the necessary parties, the fee-simple might be disposed of, before there was a failure of issue of B. A perpetuity may, with greater propriety, be defined to be a future limitation, restraining the owner of the estate from alienating the fee-simple of the property, discharged of such future use or estate, before the event is determined or the period arrived, when such future use or estate is to arise. If that event or period be within the bounds prescribed by law, it is not a perpetuity.⁸

The principal seems applicable to all future interests, as rents-charge and terms of years, which cannot be barred by the first tenant in tail in possession. A case of considerable interest arose in Ireland some few years ago. An estate having been settled by will to uses in strict settlement, a rent-charge was limited to arise after the *failure of issue of a person not taking any estate [*205] in the property settled: and upon argument it was determined by the Court of King's Bench in Ireland, that the limitation of the rent-charge was void, as being too remote.⁹

The period beyond which a springing use or executory devise is not allowed to take effect, seems to be adopted by analogy to limitations in strict settlement; as a limi-

* [But it will be observed that the author's definition of a perpetuity comprises all cases of restraint and alienation of the fee-simple, previously to a future event or period, whether such event or period be within the bounds prescribed by law or not. In order to render the definition complete, the words "such event or period being more remote than allowed by law," should be added to it.]

⁹ *Hartopp v. Lord Carbery*, 1819.

tation to A. for life, with remainder to his first and other sons successively in tail, with remainders over of the same kind; the first tenant in tail cannot be deprived of the possession beyond a life or lives in being; and in consequence of his minority, he may be deprived of the actual power of alienation until twenty-one years after; and hence it has been contended in the late case of *Beard v. Westcott*, 5 Taunt. 393,¹ and 5 Barnw. & Ald. 801,² that a limitation after an estate for a life or lives in being, and a gross term of twenty-one years, is not warranted by the rule prescribing the limits of springing uses and executory devises; for by analogy to settlements, from which the rule is taken, the twenty-one years must depend upon the minority of an infant, who may die during infancy, and thereby afford a chance of accelerating the limitations over. It cannot be discovered from the certificate of the Judges of the King's Bench, whether this argument prevailed; *but if [*206] it should be ever judicially adopted, it would, no doubt, seriously affect many titles: the rule having been, at least in practice, settled since the Duke of Norfolk's case,³ in the reign of Charles the Second, that the limitation of time in the case of perpetuities extended to a life or lives in being, and twenty-one years afterwards.⁴

It is supposed, however, that the laws prohibiting perpetuities in springing uses and executory devises have been adopted by analogy to the common law. But I do not know where the analogy is to be discovered. In Co. Litt. 214, b. it is said, "that if I enfeoff another of an acre of ground, upon condition, that if mine heir pay to

¹ [1813.]

² [1822.]
³ 3 Ca. in Ch. 1, et seq. 2 Rep. in Ch. 119. 2 Swanst. 454.]

⁴ [In *Bengough v. Edridge*, 1 Sim. 267, cited *supra* (201,) decided since the above was written, the Vice-Chancellor, Sir J. Leach, said, "he considered it to be fully settled that limitations by way of devise, or springing use, might be made to depend upon an absolute term of twenty-one years after lives in being:" and this doctrine was afterwards established on an appeal to the House of Lords in the same case, under the title of *Cadell v. Palmer*, 10 Bing. 140. The judges then gave as their opinion in answer to questions put to them by the house: 1st, That the limit is a life or lives in being, (in the case in question it was 28 lives,) and a term in gross of twenty-one years afterwards, without reference to the infancy of any person whatever; and 2ndly, That the term in gross of twenty-one years cannot be lengthened by adding to it a period equal to the ordinary or longest time of gestation, but that the period of gestation can be allowed in those cases only in which the gestation exists.]

the feoffee, &c. 20s., that he and his heirs shall enter, this condition is good." But I do not find any rule of the common law confining the period, *within [*207] which the entry is to be made; and although an *interesse termini* may be created at the common law, I am not aware of any case at the common law fixing the period, within which it must take effect in possession. The converse, therefore, of the supposition, will probably be more correct; for it can scarcely be doubted, that by analogy to the modern doctrine of perpetuities, the rights of entry upon common law conditions, and the *interesse termini*, would be confined to the time allowed in cases of executory devises and springing uses.

It may be proper to conclude these observations on perpetuities, with noticing a case of great importance, and on the validity of which many titles depend.

An estate is devised to A. and his heirs, he and they taking and using a particular surname. In this case it has been contended, by gentlemen of respectability, that if A. assumes the name, he acquires the estate, subject to a condition in law, that if he or his heirs discontinue to use the surname, the heir at law of the testator will have a right of entry upon the estate, at whatever period the non-user of the name may happen. If this construction should be correct, a perpetuity would be created; but I cannot entertain a doubt, that the principle of law prescribing the boundaries within which springing uses and executory devises are to take effect, would apply to the entry *of the heir in this case, [*208] upon the breach of the condition, if it were admitted, that such condition was not performed by taking the name.

But independently of viewing the case upon the principle of perpetuity, there seems to be no doubt, that the heir, in this case, would have no right of entry upon the non-user of the name: the devisee having, in the first instance, assumed the name.⁶

It may, on the other hand, be contended, that the devisee would take a determinable fee, not being an

⁶ [See *Doe d. Luscombe v. Yates*, 5 Barn. & Ald. 544, and *Hawkins v. Luscombe*, 2 Swanst. 375.]

estate tail, and so not within the operation of a recovery: or that the devisee would take a fee-simple subject to a condition having a double operation: first, to acquire the estate on the performance of one act; and secondly, to lose it on the non-performance of another; and that this condition is not within the laws relating to perpetuities. Neither of these arguments appear to be tenable.

Before⁶ the statute of *quia emptores* (18 Edw. 1,) an estate might have been granted to A. B. and his heirs, so long as C. D. and his issue should live, or so long as C. D. and his heirs should be *tenants of the [209] manor of Dale; and upon C. D.'s ceasing to have issue, or to be tenant of the manor of Dale, the estate reverted to the donor, not as a condition broken, of which the donor, or his heir, might take advantage by entry; but as a principle of tenure, in the nature of *an escheat* upon the death of a tenant in fee-simple without heirs general. But the statute of *quia emptores* destroys the immediate tenure between the donor and donee, in cases where the fee is granted; and consequently there can now be no reverter, or any estate or possibility of a reversion remaining in the donor after an estate in fee granted by him. This conclusion directly follows from the doctrine of tenures, and the effect of the statute of *quia emptores* upon that doctrine. The proposition does not require the aid of decided cases; but the passage in 2 And. 138, contains an accurate exposition of the law upon this subject: "If land be given to A. and his heirs, *so long as J. S. has heirs of his body*, the donee has fee, and may alien it. 13 Hen. 7; 11 Hen. 7; 21 Hen. 6, fol. 37; and says the law seems to be plain in it; and cites 11 Ass. 8, where the S. C. is put and held as before; and that there if the land be given to one and his heirs, *so long as J. S. and his heirs* shall enjoy the manor of D., those words (*so long*) are entirely void and idle, and do not abridge the estate."

The references in this passage (with the exception of

⁶ The following observations are extracted from an opinion prepared by the author, and which was subsequently well considered by two gentlemen of eminence at the bar, and signed by them.

the 11 Ass. 8,) *are not in the report correctly stated; but they are discovered in 13 Hen. 7, [*210] Easter Term, fol. 24; 11 Hen. 7, pl. 25; 21 Hen. 6, Hill. pl. 21. It will be proper to refer to the case first mentioned; premising, that, by the common law, where an absolute estate in fee-simple was granted, no restraint could be placed on the alienation of it; inasmuch as such restraint would be repugnant to the grant itself. Upon a question in the case referred to, whether a condition restraining alienation upon the grant of an estate tail since the statute *de donis* was valid, Vavisour thought it valid; but added, that he agreed that such condition imposed on a feoffee in fee-simple, *so long as J. S. has issue*, was void.

There is no ground, therefore, to consider the case in question as a determinable fee at the common law.

The fee-simple conditional at the common law before the statute *de donis* (13 Edw. 1, 1285,) differed from the fee-simple made subject to be defeated by the performance or non-performance of a condition, of which the grantor or his heir might take advantage by entry. If an estate were granted to A. and his heirs, and if the grantor paid the grantee or his heirs a sum of money, the grantor or his heirs might re-enter; or if the estate were granted to John Thompson and his heirs, with a right of entry reserved to the grantor and his heirs, in case the grantee or his heirs should discontinue to use the name of Thompson; the condition *in each [*211] of these cases is of the latter sort. Its operation is single by defeating the estate on doing, or omitting to do, a particular act.

But when an estate is given to A. and his heirs, he taking the name of B. within a given period, and he and his heirs afterwards continuing to use such name: here there are in fact two conditions: and the case resembles the fee-simple conditional at the common law, as mentioned in the statute *de donis*.

The fee-simple conditional at common law before the statute *de donis*, was created by a conveyance to a man and the heirs of his body, with a condition annexed to the gift, that if the grantee died without issue the lands should revert to the donor. They construed the con-

veyance to the grantee *and the heirs of his body*, equivalent to a fee-simple upon which no remainder could be appointed, in the same way as if the gift had been made to a man and his heirs, if he *had heirs of his body*. The birth of the issue was the performance of the condition, which, for the purpose of alienation, made the fee-simple, in the hands of the alienee, absolute, by destroying the possibility of reverter. But if, before alienation, the donee had died without issue, the lands reverted to the donor; and the remedy for recovery of the lands upon the reverter, was not by entry of the donor or his heirs, as for a condition broken, but *by a former [*212] *don in the reverter*. See Plowden, 235, where these points are accurately stated.

Hence it appears that if lands were given to A. and the heirs of his body, with a condition expressed, that if A. died without heirs of his body, the lands should revert; upon the birth of issue of A. the condition was performed, and A. had an immediate power of aliening the absolute fee-simple; so that for the purpose of facilitating the power of alienation, the birth of the issue was considered as the performance and dispensation of the condition, in a case where the right of entry was in terms expressed to arise on the *failure* of issue. This seems to be a case precisely analogous to that of a condition requiring a person to take and use a name; the taking the name gives the grantee or devisee a right to the estate, by amounting to a performance of the condition, and the subsequent non-user does not deprive him of it; for according to the principle of conditional fees, a condition cannot have a double operation, so as to confer upon a man an estate by the performance of an act required by the condition, and subsequently to deprive him of it by the non-performance of another.

It will be seen from the above observations, that in the case of the fee-simple conditional at the common law the grantee, upon the birth of issue, acquired as between himself and the donor, but without prejudice to the rights [*213] of the alienee *of the grantee, a determinable fee: which determinable fee was, as I have before ex-

plained, made absolute by the operation of the subsequent statute of *quia emptores*.

But in the case of the common condition, as in the gift or devise of an estate to John Thompson and his heirs, subject to a right of entry reserved to the donor or devisor or his heirs, in case John Thompson and his heirs should cease to use that surname, there can be little doubt, it is conceived, that courts of justice would limit the breach of the condition to the periods fixed by the policy of law, in cases of springing uses and executory devises.

VI. I have now explained the cases in which the creation and limitation of estates by way of use since the statute, correspond with, and differ from, the ancient manner of limiting and creating estates at common law. I shall now proceed to point out the alterations produced by the statute of uses in the ancient laws relative to *remitter*.

By the common law, if tenant in tail had enfeoffed his son in fee, which son at the time of the feoffment was within age, and the tenant in tail had died; the son, after the father's death, as heir in tail, would have been remitted to his former estate.⁷ But since the statute, if tenant in tail make a feoffment in fee to the use of his *issue being within age, and to his heirs, [*214] and then die; and the right of the estate tail descend to the issue, being within age; the issue shall not be remitted; for the issue has the use in fee by the feoffment, and then the statute executes it in such manner and plight as it was first limited. But in this case, if the issue waive the possession, and bring a formedon in the descender, and recover against the feoffees, he shall be remitted.⁸

It was therefore said, that if an infant or a woman, having right to lands discontinued, whereon entry was not lawful, came to such lands by way of use raised out of the estate, the first taker should not be remitted.⁹ So in Amy Townsend's case,¹ where tenant in tail made a feoffment in fee to the use of his wife for life; remainder to his son and heir apparent in fee. The feoffor and his

⁷ Litt. sec. 660.

⁸ Co. Litt. 348, b.

⁹ Hob. 255. Doe v. Woodroffe, 10 Mee. & Wels. 633*.

¹ Dyer, 54, a. b. Hob. 255. Plowd. 111.

wife died; and it was determined that the heir in tail was not remitted. However, though the first taker be not, as in the case of the issue put by Coke, yet it seems, that the *issue of that issue* shall be remitted.²

Amy Townsend's case was not affected by the statute 32 Hen. 8 (c. 28). That statute (s. 6) directs, that the fine or feoffment of the husband of the wife's land shall [*215] not operate as a *discontinuance: and, therefore, as to the wife and those claiming under her, it has considerably lessened the effect of the Statute of Uses upon remitters. The case of *Duncombe v. Wingfield*³ was in substance thus: A. and B. his wife, being seised in fee in right of B., levied a fine with proclamations to the use of themselves and the heirs of their two bodies begotten, remainder to J. S. for life, remainder to W. in tail, remainder to B. (the wife) in fee; afterwards A. alone levied another fine with proclamations to the use of himself and wife in special tail as before, remainder to himself in tail, remainder to himself and E. M. in fee. B. died without issue, and then A. died. Upon this state of the case, three material points were settled. The first point was, that where husband and wife are tenants in special tail, and the husband discontinues by fine or feoffment, and takes back an estate in special tail to himself and wife, the wife is *ipso facto* remitted, and of course the husband; though it is true the husband is so far bound by his own act, that he cannot claim it in his own person. That in Amy Townsend's case, the right of the wife was not within the saving of the Statute of Uses, and of course she was not remitted against the express words of that statute: but that the 32 Hen. 8, had changed the reason of the case; so that now, the use being raised to the wife out of the estate created by the fine, she is not in of an estate discontinued, but of [*216] *an estate whereupon she might enter after her husband's death; and that a right of entry was sufficient to support her remitter, without an actual entry. That it was true the fine of the husband alone

² Co. Litt. 348, b. [The reason is, that the issue of the issue taking by descent, is in by the common law.]

³ Hob. 254. Vide 8 Co. 71, b. Dyer, 191, b.

finally and totally barred the issues in tail, and therefore differed from a feoffment at the common law; yet the entail, which is barred as to the issue, remained, notwithstanding the fine, to the wife in right, as to herself, and to all estates and remainders depending upon it, and to all the consequences of benefit to herself, and to others by her, as long as she lived, as amply and beneficially as if the fine had not been levied.—Second point: as the husband and wife were both remitted to the first estate tail, of consequence J. S. and those in remainder expectant on that tail were also remitted: but that upon the *death* of the wife the remainders were dislodged, and turned into *rights*, as they were by the fine, and would have been, if the wife had not been remitted.—As to the third point, it was held, that after the death of the wife, the remitter ceased, and the land returned again into the estate passed by the second fine; which estate continued during the life of the husband, and would continue as long as there was issue, if there had been any; for till then, those in remainder had no title to demand the land: but after the death of the husband and wife *without issue*, the entry of J. S. was lawful. In this case Lord Hobart said, that if after the death of the wife the husband had properly suffered a recovery, he would *have barred all the remainders de- [*217] pending upon any of the estates. He also held in another place, in the same argument, that if the wife had survived the husband, and had suffered a recovery, it would have barred the remainder depending upon the first estate tail; but so long as there was issue living between them, the premises would go according to the estate passed by the second fine.⁴

⁴ [The Court of King's Bench, in the late case of Doe d. Cooper v. Finch, 1 Nev. & Mann. 130, 158, 171, and 4 Barn. & Adol. 283, had occasion to consider the doctrine of remitter, and its effect with reference to the Statute of Uses.

In that case, an estate was limited by a settlement to the use of A. for 500 years; remainder, Edward in tail; remainder, Thomas in tail; remainder, Edward in fee.

D. was the eldest son and heir in tail of Thomas.

Edward levies a fine to the use of himself in fee, and dies without issue; having, after the fine, devised the estate to trustees and their heirs, to the use of them and their heirs during the life of, and in trust for Thomas, remainder to the use of D. for life, remainders over.

Thomas enters, suffers a recovery, and devises to D. for life, with remainders over, and dies.

[*218] It is agreed, that if, in the above case, *the husband had made a *feoffment*, instead of levying a *fine*, it would not have *barred*, but only have *discontinued*, the right of the issue.⁶ Therefore, as the wife by her entry would have been remitted, so she would have purged the discontinuance, and restored the right of the issue, by restoring the discontinued estate tail. If too a tenant in tail make a feoffment to the *use* of himself *in fee*, or to the use of himself *for life*, remainder to B. for *years*, and does not dispose of the reversion; in either case, the issue, it seems, is remitted, though the tenant in tail himself is not.⁶

VII. I have before observed, that uses in their commencement were of a secret nature, depending merely upon a parol agreement or declaration between the feoffee and cestui que use. But in process of time, it [*219] was found necessary to make *some certain declaration of the use, indicative of the intention of the parties; and this declaration of the use must now, by the statute 29 Car. 2, c. 3, be in writing.⁷

D. enters.

The principal question in the case was, whether the fine by Edward, notwithstanding the term of 500 years preceded his estate, worked a discontinuance of the estate tail and remainders; but, supposing the fine worked a discontinuance, (which the Court decided it did), it was contended, in order to destroy the effect of the fine and the title of those claiming under it, that the tortious fee thereby gained was defeated by remitter: or in the words of the counsel, Mr. Hayes, that D. "having two titles, a more ancient title (i. e. the right to the estate tail under the settlement) and a later title (i. e. the estate for life under the will), and coming to the possession by the later title, must be adjudged *in* of his elder and better title. By his remitter, the title of the devisees of Edward, founded upon the discontinuance, was subverted."

The Court, however, held, that D. was not remitted. Per Patteson, J., "If D. entered under the will of his father Thomas, he affirmed the recovery suffered by his father, and was bound by the recovery; and he could not be remitted to any other estate, because so entering, he would take an estate for life under his father's will. If he did not enter under that will, he must have entered under the will of Edward; and he would then be met by the objection, that the will of Edward operated under the Statute of Uses; so that he was *in* by force of that statute. See Doe v. Woodroffe, 10 Mee. and Wels. 608, where it was held that a remitter is irrespective of intention, and that when a party enters, he is possessed, whether he will or no, by virtue of every title which he has in him, and which he could assert by entry.]" ⁶ 1 Lev. 49. 1 Sid. 63.

⁶ 1 Roll. Rep. 260. Moor. 846, pl. 1143. B. N. C. 215. 8 Co. 72, a. Lane, 93 to 96.

⁷ See Holt's Rep. 736. By the 7th section of the above act, it is enacted, "That from and after the 24th day of June (1677), all declarations, or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party, who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

The conveyances by bargain and sale, and covenant to stand seised, are in fact nothing more than declarations of uses; for the use being served out of the seisin of the bargainer and covenantor in those conveyances, they merely serve to declare the use to the bargainee and covenantee. But upon such conveyances as operate by way of transmutation of possession, the use may be declared by a deed or writing distinct from the conveyance by which the possession is transferred. Indeed, upon the conveyances by feoffment and lease and release, it is now universally the practice to declare the use in the same deed immediately after the habendum. But in respect to fines and recoveries, the uses are declared either by deed *precedent* or *subsequent* to the levying of the former, or suffering the latter. After the statute 27 Hen. 8, c. 10, it became questionable, whether if a recovery were suffered or fine levied, without any previous declaration of the uses, any subsequent deed [*220] could direct them? For it was thought, that upon suffering the recovery or levying the fine, the use resulted to the recoveree or conuzor, which resulting use the statute immediately executed: so that the use being once vested and executed by the statute, it could not be divested by any subsequent declaration. However, in Dowman's case⁸ it was determined, that although the use resulted to the recoveree or conuzor until the subsequent declaration, yet, when that was made, the use was immediately executed according to the declaration. Soon after the statute 29 Car. 2, c. 3, which directs that all creations and declarations of uses shall be in writing, it again became a doubt, whether resulting uses upon fines and recoveries were not so executed as to exclude any *subsequent deed*:⁹ for it was supposed that the statute required the use to be declared either previously to, or at the time of, levying such fines and recoveries. Therefore by the statute 4 Anne, c. 16, s. 15, declarations of

⁸ 9 Co. 7, b. 28 Eliz. See Bessett's case, Dyer, 136, a. In Dowman's case, a recovery was suffered in Hilary Term, 15 Eliz. The original writ was dated the 20 Jan., 15 Eliz., returnable the 22 Jan. Seisin was delivered the 4 Feb. (Moor. 191). The deed declaring the uses of the recovery was dated the 1 Feb., 15 Eliz.

⁹ See Gilb. *Uses*, 62.

the uses of fines and recoveries manifested by any deed made by the party, *after* the levying of such fines or suffering such recoveries, shall be as effectual as if the [*221] *29 Car. 2, c. 3, had not been made.¹ This statute only mentions fines and recoveries; and therefore the same doubt, if it was well founded, still remains as to the conveyance of a feoffment.

I shall now consider, first, who may declare uses; secondly, in what cases one declaration of the use shall be controlled or annulled by a subsequent declaration; thirdly, where the same instrument contains two contradictory declarations; fourthly, the general construction upon, and effect of, the declaration of uses.

First. Who may declare or limit the use.

[*222] The king may declare uses upon his letters patent, though indeed the patent of itself implies a use.² But if the king grant lands to J. S. and his heirs by his letters patent, to the use of J. S. *for life*; here J. S. has only an estate for life, and the king has the inheritance without any office found: for implication out of matter of record ever amounts to matter of record. The queen may also declare uses.³

An idiot, or person of non-sane memory, may declare uses upon a fine or recovery; which declaration of uses will continue valid as long as the conveyance, upon which the uses are declared, remains of force.⁴ It is the same with respect to an infant. Therefore if an infant

¹ "And whereas it hath been doubted, whether since the making of the said last-mentioned act of parliament (29 Car. 2, c. 3), the declaration of uses, trusts, or confidences, of any fines or common recoveries manifested by *deed*, [these words, "by deed," are supposed to have been inserted in the statute by mistake; as any writing, though not under seal, would have been sufficient by the act 29 Car. 2, c. 3: see Sugden's note to Gilbert on Uses, 62 (113).] made after the levying or suffering of such fines or recoveries are good and effectual in law; it is hereby declared, that all declarations, or creation of uses, trusts, or confidences of any fines, or common recoveries of any lands, tenements, or hereditaments manifested and proved, or which hereafter shall be manifested and proved by any deed already made, or hereafter to be made, by the party who is by law enabled to declare such uses or trusts, after the levying or suffering of any such fines or recoveries, are and shall be good and effectual in the law, as if the said last-mentioned act had not been made." See *Bushell v. Burland*, Holt's Rep. 733, where the declaration of uses was *four years* after the fine had been levied.

² *Bac. Uses*, 66.

³ *Ibid.*

⁴ *Mansfield's case*, 12 Co. 124. *Lewing's case*, cited 10 Co. 42, b. But see 4 Leon. 89, and *Sir Butler Wentworth's case*, cited 2 Ves. 403. 3 Atk. 313. 13 Vin. 305, pl. 3, and note (M. a.)

levy a fine, or suffer a recovery, and limit the use thereupon, he cannot avoid the declaration of the use, without avoiding also the fine or recovery:⁵ for as the matter of record stands, the law supposes that the conuzor or recoveree was of full age; and the deed to declare the uses, being part of the fine or recovery, shall stand likewise. But a covenant by an infant in consideration of marriage or blood to stand seised to an use, is void.⁶

In a case where A. tenant for life, and B. his [*223] *eldest son, an infant, tenant in tail in remainder, entered into marriage-articles, by which A. alone covenanted within a year after his son should come of age, that he and his son would by fine or recovery convey the settled estate to certain uses; and both A. and B. sealed the deed, and within the time specified joined in a fine and recovery, it was determined, that the mere consent of B., by his sealing the deed, was not a sufficient declaration by him of the use of the fine and recovery.⁷ But in *Slocombe v. Glubb*,⁸ where, upon the marriage of a male infant and an adult female, the intended wife conveyed her real estate to certain uses, and both the intended husband and wife enter into a covenant within one month after the infant arrived at the age of twenty-one years, to suffer a recovery of the infant's estate to the uses declared of the wife's estate: the question arose upon a bill by the trustees to have a specific performance of the infant's covenant, whether he was bound? Lord Thurlow said, that it was not necessary to determine how far the infant husband could be bound by his own contract: for the wife being adult, had also entered into the covenant; and the husband must answer her contract.⁹

⁵ Bac. Uses, 67. 2 Co. 58, a. 10 Co. 42, b. 3 Atk. 710. Moor, 22, pl. 73. 13 Vin. 304, pl. 1.

⁶ Bac. Uses, 67.

⁷ Nightingale v. Ferrers, 3 P. W. 207.

⁸ 2 Bro. Cha. Ca. 545. 1 Ves. J. 28.

⁹ How far the *real* estates of *female* infants can be bound by marriage-contracts, see Cannel v. Buckle, 2 P. W. 243. Harvey v. Ashley, 3 Atk. 607. Durnford v. Lane, 1 Bro. Cha. Ca. 106. Caruthers v. Caruthers, 4 Bro. Cha. Ca. 500. Clough v. Clough, 3 Woodison, 453, note. 5 Ves. 710, and in Milner v. Harewood, 18 Ves. 275, 276. [See also the cases of Trollope v. Linton, 1 Sim. & Stu. 485. Simson v. Jones, 2 Russ. & My. 365. Johnson v. Johnson, 1 Keen, 648. In the first of these cases, it was held that the leasehold estates of a female infant may be bound by articles entered into on her marriage, because

[*224] It seems that a feme covert cannot, *without the consent of her baron, create or limit the use of her lands.¹ But if *baron* and *feme* levy a fine, or suffer a recovery, of lands, of which they are seised in right of the feme, though they ought regularly to join in the declaration of the uses of such fine or recovery, yet if the husband in such case alone declare the uses, his declaration will bind the feme (although an infant,²) if she do not dissent to it;³ for as she joined with her husband in the fine or recovery, the presumption is, if the contrary cannot appear, that she agreed with him in the declaration of the uses. Indeed, if she acquiesce *for any length of time after her husband's death in the declaration of uses made by him, she cannot afterwards invalidate the fine or recovery.⁴ As the conveyances by feoffment and lease and release do not bind the feme, although she be a party, any declaration by her and her husband of the uses raised upon those conveyances, shall be void as to her.⁵ But if husband and wife bargain and sell lands for money, and afterwards levy a fine to the bargainer, the bargain and sale is considered merely as the declaration of the use of the fine, and as such will bind the wife.⁶ If in declaring the uses of a fine levied, or recovery suffered, of lands held in right of the wife, the husband and wife make separate declarations of the uses, neither of them can stand, and then it will be the same as if no declaration were made; in which case the use will result and return

as to personal estate they are the articles of the husband; and that, in this respect there was no difference between chattels real, which might survive to the wife, and her personal estate absolutely vested in possession in the husband. In the second case, the Master of the Rolls (Sir John Leach) treated it as clear, that the real estate of a female infant would not be bound by a settlement on her marriage, even though such settlement were made with the approbation of the Court; and he held that the same principle was applicable to personal estate which had been previously settled to *her separate use*. It may be observed, that as regards the incapacity of infants to bind their *real* estates by settlement, there appears to be no good ground for any distinction between males and females.]

¹ See *Johnson v. Cotton, Skin.* 275. And 164, pl. 209, in case of *Colgate v. Blythe*.

² 2 Roll. Ab. 798. 22 Vin. 232, pl. 2.

³ Beckwith's case, 2 Co. 57, a. Moor. 197. Anon. Moor. 22, pl. 73. Lusher v. Banpong, Dy. 290, a. See the cases collected in note to pl. 1. 22 Vin. 232, T.

⁴ *Swanton v. Raven,* 3 Atk. 105.

⁵ *Gilb. Uses,* 244.

⁶ 2 Co. 57, a. Moor. 22, pl. 73. See the cases in note to pl. 4, 22 Vin. 232.

to its former course, viz. to the feme and her heirs.⁷ But with respect to baron and feme, we must distinguish between a limitation of the use of part of the estate in the land, and the limitation of the use of part of the land itself. This distinction was taken in Beckwith's case.⁸ Thus, if husband and wife differ in the limitation of the particular use, but concur in the *limitation of the uses in remainder, yet the whole of [*226] the uses are void. But if they agree in limiting the use of part of the land itself, and vary in the declaration of the use of the residue, the declaration shall be good for the part they agree in, and void for the remainder.

Where a husband seised of the fee-simple of an estate, to which the dower of his wife attaches, conveys to a purchaser, and enters into a covenant that he and his wife will in a subsequent term levy a fine to the purchaser, it is not absolutely necessary that the wife should join in the declaration of the uses of the fine;⁹ for in this case the fine operates, so far as concerns the wife, as an extinguishment of her right to dower; and there can be no resulting use upon a conveyance operating as the release of a right,¹ and not as the transfer of an estate.

So, if tenant for life and remainder-man levy a fine, or suffer a recovery, and the tenant for life alone declare the uses, this declaration shall not affect the remainder-man.² And it should seem, that if the remainder-man seal, and be a party to the deed, in which the tenant for life alone covenants to suffer a recovery, &c., to certain uses, *this does not bind the remainder-man, [*227] though he afterwards should join in suffering the recovery, &c.³ Joint-tenants may each declare different uses of their respective shares.⁴

⁷ Moor. 197, pl. 347. See note to pl. 6, 22 Vin. 233.

⁸ 2 Co. 56, b. 58, a. 22 Vin. 233, pl. 6, 7, and notes in the margin.

⁹ See Haverington's case, Owen, 6. 2 Bac. Ab. 140; and Eare v. Snow, Plowd. 514.

¹ 13 Co. 55. Note to pl. 1, 22 Vin. 209 (O. 3).

² See Roe v. Popham, Dougl. 28. Argol v. Cheney, 22 Vin. (T. 6) 236, pl. 1; and note in the margin.

³ Per Master of the Rolls in Nightingale v. Ferrers, 3 P. W. 206. But note, in that case the person in remainder was an infant; therefore quare. [There does not appear to be any question of the rule mentioned in the text being general in its application, and not confined to cases where the remainder-man is an infant.

⁴ For note see next page.

Secondly. In what cases a previous limitation of the use shall be controlled by a subsequent declaration by a distinct instrument.

I have before had occasion to remark, that in a conveyance by *deed*, transferring the seisin to a grantee, such as a feoffment, or lease and release, the use is declared by the conveyance; and it scarcely ever occurs in practice, that the use is in that case declared by an instrument distinct from the deed conveying the seisin. Where the conveyance is by bargain and sale, or covenant to stand seised to uses, the conveyance itself is the declaration of the use.

But when the assurance transferring the seisin to [*228] *serve the uses is by fine or recovery, the uses are limited by deed executed either before, or after, the levying the fine, or suffering the recovery. If before, the deed is said to *lead*, and, if after, to *declare* the uses of the fine or recovery. It has happened, in the case of fines and recoveries, that there have been contradictory limitations of the uses; and from this circumstance several intricate and perplexing points have arisen.

If there be a deed leading the uses of a fine or recovery, those uses may be altered, varied, or absolutely revoked previously to the levying the fine or suffering the recovery. When the fine or recovery is conformable in time, persons, and other circumstances, with the deed leading the uses of it, then the variation, alteration, or revocation of the uses may be effected:

First, By a deed or other instrument of as high nature as the preceding deed or instrument; for *nihil tam conveniens est naturali æquitati, unumquodque dissolvi eo liyamine, quo ligatum est*: but in this case a *deed* leading the uses of a fine or recovery cannot be varied by a mere writing without seal.⁵

For with regard to the declaration of uses on fines and recoveries, there is no difference between infants and persons of full age (ante, 222): therefore, if a remainder-man being of full age and party to the fine or recovery would be bound, an infant would be bound also. But, in fact, neither is affected by the declaration of uses made by the tenant for life alone.]

⁴ 2 Co. 58, a. 22 Vin. 236, pl. 1.

⁵ Countess of Rutland's case, 5 Co. 26, a.

Secondly, By the mutual consent of all parties concerned in interest.

*The author of the Touchstone (519) has adopted the rule, "When the agreement for the limitation of uses is precedent, whether it be by writing or word (it must be now in writing by the Statute of Frauds,) it is but *directory*, and doth not bind the estate until the same assurance be afterwards had; and therefore by a new agreement, or declaration made in the same manner as the former, that is to say, in writing, if the former be so, and *between the same parties*, either before or at the time of the same assurance passed, new uses may be made, and the former uses changed."

By⁶ a deed dated on the 21st of August 1661, Philip Stapilton was tenant for ninety-nine years, if he should so long live, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to his right heirs.

Philip having two sons, Henry and Philip, they by deeds of lease and release, dated the 9th and 10th of September 1724, release and confirm to Thompson and Fairfax all those manors, &c., to hold to them, their heirs and assigns, to the use (as to part) of Philip the father, his heirs and assigns for ever, and as to another part, to the use of Philip the father for life, remainder to Henry the son for life, remainder to two trustees to preserve contingent remainders, remainder to *his first and every other son in tail male, remainder to Philip the son for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to the daughters of Henry in tail, remainder to the daughters of Philip the son in tail, remainder to the right heirs of Philip the father; and as to the remaining part, to the use of Philip the father for life, with the like limitations in the first place to Philip the son and his issue, and then to Henry and his issue, remainder in fee to the father.

There were covenants to suffer a recovery within twelve months, and likewise for further assurances. To

⁶ 1 Atk. 2, Staplton v. Staplton.

this deed the heir at law of the surviving trustee in the deed of 1661, was not a party.

But by deeds of lease and release, dated the 28th and 29th of September 1724, to which the heir of the surviving trustee of the deed of 1661 was a party, the father and two sons made Thompson and Fairfax tenants to the præcipe, in order to suffer a recovery for the purposes mentioned in the former deeds of the 9th and 10th of September.

Before any recovery suffered Henry died,⁷ leaving issue the plaintiff.

[*231] *Afterwards by lease and release, dated the 12th and 13th of April 1725 (to which the heir of the surviving trustee of the deed of 1661 was a party,) Philip the father, and Philip the son, covenant to suffer a recovery, in which Thompson and Fairfax were to be tenants to the præcipe, to the use, as to part, of Philip the father, his heirs and assigns; and as to the other part, to the use of Philip the father for life, remainder to Philip the son in fee.

In Trinity term 1725, a recovery was suffered, in which were the same tenants to the præcipe, the same demandant and the same vouchees (except Henry who was dead,) as were covenanted to be by the first deed; it was likewise suffered within twelve months after the first deed.

Lord Hardwicke stated the first question to be, whether the lease and release of the 9th and 10th of September 1724, would amount to a good declaration of the uses of the recovery, notwithstanding the subsequent deed of April 1725.

His lordship observed, that as uses must arise out of the agreement of the parties, the parties may change the uses; but that must be done by the mutual consent of all the parties concerned in interest. "But in the present case, the second agreement not being between all the parties concerned in interest, ought not to control the first declaration; and especially as this recovery was [*232] *suffered within the time prescribed by the first deed, and between the same demandant and ten-

⁷ [The son Henry had been found illegitimate upon an issue directed by the Court.]

ant. The consideration for suffering the recovery was good, both in law and equity; and there is no case to warrant me to say, the first agreement is not good and binding, or that the tenant in tail could by his own agreement afterwards change the uses."⁸

His Lordship added, that if it was doubtful whether the recovery suffered in 1725 should enure to the uses declared by the deed of 1724, he was of opinion, the recovery would operate to make good those estates which passed by the deed of 1724.⁹

⁸ *Bingham v. Hussey*, 12 Car. 2. 1 Cha. Rep. 192, ed. 1715. "Thomas Hussey settles by deed, 22 Cor. 1, on Delaline Hussey his son, in consideration of 6,000*l.* portion with the wife of Delaline, and covenanted to levy a fine; and afterwards in 1685, the defendant procured him to make another settlement contrary to the former, and left out the limitation to the heirs male, and levied a fine thereof. This court upon the proofs of the first agreement, decreed the latter deed and fine to be void and set aside, and the premises to be enjoyed according to the first deed, as if a fine had been levied."

⁹ This is upon the principle of *Cheney v. Hall*, Amb. 526, (1765,) *Moody v. Moody*, ibid. 649, (1767,) and *Goodright v. Mead*, 3 Burr. 1703.

Cheney v. Hall.

1706. Conveyance by G. W. the father,

To the use of himself for life, with remainder as to part,
To the use of his wife for life, remainder as to the whole,

To the use of the first and other sons of the marriage [in tail.]

1733. Conveyance by lease and release upon the marriage of G. W. the eldest son of the marriage,

To the use of himself for life,
To the use of his intended wife for life,
To the use of the heirs of the body of the wife,
His own right heirs.

1746. G. W. the father, and son, suffer a recovery and declare the use,

To a mortgagee in fee, and subject thereto,
The father for life,
Son in fee.

Lord Northington thought that the common recovery enured to the uses of the settlement of 1733.

Moody v. Moody.

E. M. tenant in tail in the year 1709, conveys

To the use of himself and intended wife for their lives,
Heirs of their bodies,
Himself in fee.

Covenant to do further acts by fine or recovery.—Recovery afterwards suffered by E. M.

Lord Camden held, that the recovery barred the entail, of which he (E. M.) was seized before the settlement, and operated as a confirmation of the settlement.

Goodright dem. Tyrrel v. Mead.

J. S. tenant in tail with the immediate reversion, 24th, 25th Oct. 1742, in consideration of an intended marriage conveys to trustees,

To the use of himself for life, with remainders over.

1761. Recovery by J. S. to the use of L. in fee, in trust to sell and pay debts, &c.

1763. Conveyance by L. the trustee to the use of a purchaser in fee.

The court unanimously of opinion, that the recovery enured to the uses of the settlement.

[*233] But when there is a deed leading the uses *of a fine or recovery to be subsequently levied or suffered, and the fine or recovery varies from the preceding deed in time, persons, or other circumstance, then the uses of the first deed may, previously to the fine or [*234] recovery, be varied by *another instrument, although such subsequent instrument be not a deed, but merely a writing without seal;¹ and although all the persons interested under the first declaration are not parties to the second:² and indeed the uses of the first deed may, after levying the fine or suffering the [*235] *recovery, be varied;³ but in this case, if the doubt suggested by the statute 4 Anne, c. 16, s. 15, be sufficiently grounded,⁴ the subsequent variation of the uses must be by *deed*, and not merely by writing without seal.

¹ Jones v. Morley, 2 Salk. 677. 9 Will. 3. The abstract of this case is thus :-

29 Jaf. 1665. (Hilary Term.)

Deed of covenant to levy a fine in the then next Hilary Term (1666.)

31 Jan. 1665.

Agreement, not being a deed, between the same parties, that the uses of the deed of the 29th Jan. 1665, should be revoked.

The fine was levied in Hilary Term, 1665, and not in Hilary Term, 1666, and consequently there was a variance.—The first deed was revoked.

² Countess of Rutland's case, 5 Co. 25, b. 2 Jac. 1.

The abstract of this case is as follows:

10 March, 21 Car.

Voluntary settlement after marriage between,

1. Edward, Earl of Rutland,

2. Sir Gilbert Gerrard, and Thomas Holecroft,

By which the earl covenants, before the end of Trinity Term then next, by fine or other conveyance, to assure the manor, &c.

To the use of,

The earl and the countess, his wife, for their lives,

The heirs of the earl.

29 March, 21 Car.

Voluntary deed between,

1. Edward, Earl of Rutland,

2. Lord Burghley, Sir Gilbert Gerrard, and others,

By which the earl covenants to couvey the same manor before the Feast of the Annunciation, then next,

To the use of,

The earl in tail male, remainders over.

No fine levied in Trinity Term.

17 Sept. following.

A fine was levied by the earl to Sir Gilbert Gerrard and Thomas Holecroft;

At the same time, the earl levied another fine to Lord Burghley and the parties to the second deed.

The uses of the first deed revoked.

³ Jones v. Morley, *supra*. Shep. T. 520.

⁴ See Mr. Sugden's note, Gilb. *Uses*, 111. [Ante, 220, 221, n. (1).]

When the fine or recovery does not vary in circumstances from the deed leading the uses of it, the use is executed and fixed upon the levying the fine, or suffering the recovery: and no subsequent declaration is admitted to control the operation of the previous deed or instrument.⁴

Although the fine or recovery does not altogether correspond in circumstances with the deed or instrument leading the uses of it, if there be no subsequent declaration of the uses, the fine or recovery shall still enure to the uses of the leading deed or instrument.⁵

*If there be no preceding limitation of the use, [*236] the uses of the fine or recovery may be subsequently declared according to the statute of 4 Ann. c. 16, s. 15, by deed; but it is by no means certain, that such subsequent declaration may not be controlled by another averment by deed, although there be no variance in the fine or recovery.⁶

The author of the Touchstone has observed (519), "that if the declaration be subsequent, if in the interim between the assurance had, and the declaration of the uses, the conuzor or recoveree sell, give or charge the lands to others, this subsequent declaration will not subvert the mean estate, charge, or interest."

Thirdly. It sometimes happens that in the same instrument there are two declarations of the use, differing from each other.

The rule is, that the first declaration shall prevail; and that the second shall be void.⁷ When the use is limited by the habendum of a deed, and there is in the subsequent part of the instrument a covenant to levy a fine of the same land *to different uses, if the fine [*237] be levied after the seisin, out of which the uses are to arise, is transferred to the grantee, there is no

⁴ Shep. T. 520. Salk. 676. *Tregame v. Fletcher*, 9 Co. 10, b, 11, a. Comb. 429. 1 Atk. 9.

⁵ Shep. T. 520. 2 Co. 76, a. *Havergill v. Hare*, 2 Roll. Ab. 799. 1 Atk. 7. 13 Vin. 306, pl. 2, P. a. 2, and the cases collected in the note.

⁷ Second resolution in *Tregame v. Fletcher*, 2 Salk. 676. Shep. Touch. 521. *Vavisor's case*, Dyer, 307, b.

⁸ *Southcoat v. Manory*, Cro. Eliz. 744, J. C. Moor. 680, by the name of Wilmot & Knowles. See the case of *Doe dem. Leicester v. Bigg*, 2 Taun. 109. The first words in a *deed*, and the last in a *will*, shall prevail. Shep. T. 88. Co. Lit. 112, b.

ground to contend that the use limited after the *habendum* can be controlled by the declaration of the use of the fine; for the deed, transferring the *seisin* from which the use is to arise, is perfected upon the delivery of the deed, by the operation of the Statute of *Uses*; and the subsequent fine not operating by way of transmutation of possession, but as a confirmation or extinguishment of right, there is no *seisin* to serve the use limited upon it. It is a more difficult case, where the fine is levied of a term preceding the execution of the deed; but even in this case, it should seem, that the fine would be considered merely as a further assurance, not disturbing, but by way of confirmation of, the first limitation of the use.¹ The latter point, however, is extremely doubtful.

Fourthly. The general construction upon, and effect of, the declaration of uses.

(1.) A very slight expression is sufficient to declare the uses of a fine or recovery; no formal set of words being required for that purpose. Therefore, whenever the intention of the parties can be collected in the limitation of the uses of a fine or recovery upon any expression in a *precedent or subsequent declaration or [^{*238]} conveyance, such declaration or expression is sufficient to declare the uses of the fine or recovery:¹ and the uses may be declared by deed indented, or by deed poll.

(2.) "The declaration of the uses must be certain, and that especially in three things; in the persons to whom, in the lands, &c. of which, and in the estates by which the uses are declared; and if there want certainty in either of these, the declaration is not good; and it must be complete in itself without any reference to indentures or other writings to be made afterwards, for then it is

¹ See *Southcoat v. Manory*, cited above; and see 22 Vin. 227, pl. (9), 8. *Oliver v. Gyles*, Cro. Eliz. 300.

¹ See 3 P. W. 208. 1 Lord Ray. 290. 12 Mod. 162. A covenant for further assurance (Hob. 275. 13 Vin. 305, O. a. pl. 2), or a condition of re-entry (13 Vin. 309, T. a. pl. 1.), may amount to a declaration of the use. [The fine or recovery, and the declaration of the uses (whether precedent or subsequent,) together constitute one assurance; and the operation of the fine or recovery will be governed by the intention of the parties expressed in, or to be collected from, the declaration of the uses. As to the controlling effect of the declaration of uses, see *Earl of Jersey v. Deane*, 5 Barn. & Ald. 569. *Tyrrell v. Marsh*, 3 Bing. 31.]

but an imperfect communication and no complete declaration."²(a)

(3.) It is not necessary that there should be a consideration expressed in a deed to lead or declare the uses of a fine or recovery.³

*(4.) It has been before observed, that if a man, [*239] seised on the part of his mother, had made a feoffment without any consideration or declaration, and the use thereupon had resulted to him in fee, or if he had expressly declared the use to himself and his heirs; in either case the descent would not have been broken, but the lands would have descended to the heirs on the part of the mother.⁴ So, if tenant in tail, who takes by descent from his maternal ancestor suffer a recovery, and declare the use to himself in fee, the descent is not broken, and the newly-acquired fee will descend to the heirs *ex parte materna*.⁵ But here a distinction *is taken— [*240] if a tenant in tail take by *purchase* under a settlement, made by his ancestor *ex parte materna*, and suffer a recovery with the declaration of the use to himself in fee, the estate in fee will descend to his heirs *ex parte paterna*.⁶ But it should seem, that in this case, if the reversion in fee *ex parte materna* had been in the tenant

¹ Shep. Touch. 520, 6th ed.

² See Har. Co. Litt. 123, a, note 8. 1 Ld. Raym. 290.

⁴ See ante, 60. 22 Vin. 185, pl. 4, 5, notes. [Co. Litt. 13, a. Godbolt v. Freestone, 3 Lev. 406. Abbot v. Burton, Salk. 590.]

⁵ Roe dem. Crow v. Baldwere, 5 Term. Rep. 104. [And on a partition between a co-parcener and a stranger, to whom one of the shares in co-parceny had been conveyed, the line of descent was not broken, as to the co-parcener, by a limitation of his divided share to the use of himself in fee. Doe dem. Crosthwaite v. Dixon, 5 Adol. & El. 834. It seems also that where a party entitled to an equitable estate by descent *ex parte materna*, procured a conveyance of the legal estate to himself, the equitable fee became merged in the legal, so as to let in the paternal heirs; though, where the party entitled to such equitable estate was an infant, a court of equity would not consider the conveyance as actually made for the purpose of breaking the course of descent. Langley v. Sneyd, and others, 1 Sim. & Stu. 45.

By stat. 3 & 4 W. 4, c. 106, s. 3, "When any land shall have been limited by any assurance executed after the 31st day of December 1833, to the person, or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate, or part thereof." This provision, it will be observed, is confined to express limitations, and does not therefore affect uses which merely result. And see Lord Derwentwater's case, 9 Mod. 172.]

⁶ Martin v. Strachan, note (a), 5 Term. Rep. 107.

(a) See Jarvis v. Babcock, 5 Barb. Sup. Ct. (N. Y.) 139.

in tail, a fine by him would have had a different operation, for it is the nature of a fine to let in the reversion.⁷

VIII. Upon the construction of the statute four necessary points are to be observed for the execution of an use:⁸—1st, a person *seized* to the use; 2dly, a *cestui que use in esse*; 3dly, a use in esse, *scil.* in possession, reversion, or remainder; 4thly, an estate or seisin, out of which the use is to arise; for the words of the statute are, that the estate of such person seized to the use shall be adjudged in *cestui que use*, &c. It follows, that if the above requisites do not concur, there can be no execution of the use:—and, therefore, that contingent uses, during the suspense of the contingency, cannot be executed by the statute.⁹

*The doctrine of contingent uses is explained [*241] in the two cases of *Dillon v. Freine* (or Chudleigh's case) and *Wigg v. Villers*.¹

Chudleigh's case² was in effect thus: A. enfeoffed B. C. D. and their heirs to the use of himself and his heirs on the body of Mary (then the wife of Sir T. C.) lawfully begotten, and in default of such issue, to the use of his heirs on the body of Elizabeth (then the wife of R. B.) lawfully begotten; and in default of such issue, to the use and performance of his will for ten years immediately after his death, and after the said term ended, to the use of the said feoffees and their heirs during the life of C. C. his son, and after his death to the use of the first issue male of the said C. C. lawfully to be begotten, and to the heirs of the body of such first issue male lawfully begotten, and in default of such issue, to the use of the second issue male, &c., in like manner; and so on to the tenth issue, with several remainders over, and with the reversion in fee to the said A. Afterwards A. died without issue by either of the women; and the feoffees before the birth of the first son of C. C. enfeoffed the said C. C. to the use of himself in fee, without any consideration, but with notice of the former uses. The first

⁷ See 5 Term. Rep. 108, 109. [Simmonds v. Cudmore, Salk. 338. 1 Shower, 370.]

⁸ 1 Co. 126, a.

⁹ [2 Roll. Ab. 796. 22 Vin. 228, 229, 230.]

Bac. Uses, 45.

¹ 1 Co. 126, a.

son of C. C. was afterwards born; and the question was, whether the feoffment destroyed the use in *remainder so limited to the first son of C. C.? [*242] which question depended upon another, viz., whether before the contingency happened, i. e. the birth of the son, the use vested, and was executed in the son? It was determined by the majority of the judges that the use before the contingency was not executed in the son, and that the feoffment entirely destroyed and prevented the execution of the uses in contingency, although made without any consideration and with notice.

By the arguments of the Judges in this case, it seems to have been the better opinion, that upon the feoffment of A. all the uses *in esse* were immediately executed, and that there was no present actual seisin left in the feoffees, nor were the contingent uses executed; that though there was no *actual* seisin left in the feoffees after the first feoffment, yet a *possibility* of seisin remained in them to serve the contingent uses, when they should arise, or come *in esse*: that this possibility of seisin, if it had not been disturbed, would have enabled the uses, when they came *in esse*, to have been executed by the statute; but as at the time the uses came *in esse* in the principal case, the possibility of seisin was destroyed, that there consequently could be no seisin left to serve such uses.

In the debate upon the case of *Wigg v. Villers*, reported by Roll and mentioned hereafter, it was agreed that if a feoffment be made to the use of A. for life, remainder to C. for life, remainder to *the first son of C. in tail, with divers contingent uses in [*243] remainder, with the remainder to the right heirs of A.; in this case the feoffment of A. will not destroy the contingent uses, because though the remainder to C. was divested, yet he had a right to enter for the forfeiture, which right of entry would support the contingent uses: that if C. had made his entry either in A.'s lifetime, or after his death, that would have reduced the contingent uses; so that if a son had been born in his lifetime, the use to such son would have been executed by the statute without any entry by the first feoffees; that if C. had died leaving a son, and without having made his

entry, the first feoffees might have entered, and thereby restored their seisin (*scintilla juris*) to serve the use to the son of C.

In the first edition of this work, the following case was stated :—If there be a feoffment to the use of A. for life, remainder to his first son, &c., remainder over, if A., before the birth of a son, make a feoffment, this shall divest all the estates, *but still there is a right of entry in the feoffees to restore the former estate*, and upon their entry they have a seisin sufficient to serve the use to such first son. But the case thus put, as to the right of entry in the feoffees, and the operation of it, does not appear to be correct. For supposing the *scintilla juris* remaining in the feoffees could enable them to enter to revest the estates divested (which it will do in particular cases, as [*244] in the *case previously mentioned from Roll,) yet in the case here stated their entry could serve no purpose whatsoever. For there being no son born at the time of the entry, the use to such son could never be executed; according to the rule, that a contingent remainder must take effect (if at all) *eo instantे*, that the particular estate determines. If indeed, as in the case from Roll, a vested estate had supported the contingent remainder, till it came *in esse*, and then the intervening tenant of the vested estate for life had died, without having made an entry, the entry of the feoffees would have supported the contingent remainder, which came *in esse* during the existence of the intervening estate. But that is different from the present case. In the case from Roll the vested estate supported the contingent remainder during its contingency, and the subsequent entry of the feoffees restored the seisin to serve the use, which *then* was *in esse*. In the present case the general feoffees have no vested estate to preserve the contingent remainders during their contingency; but could by their entry only give such a seisin as would *serve uses in esse at that time*; it was the want of this vested estate in feoffees, (*which it was agreed in Chudleigh's case they had not*), that gave rise to the practice of inserting trustees to preserve contingent remainders. By this mode the trustees have a power to enter for forfeiture, and to con-

tinue in possession during the life of the tenant for life; and this estate, limited to them upon commission of forfeiture, *has been held to be a vested estate, and will preserve the contingent uses as effectually as [245] the intervening estate for life in the case put by Roll, supposing the trustees in the one case, and the intervening tenant in the other, to make an *actual entry*. Indeed Mr. Fearne has endeavoured to prove, that the mere *right* of (without an *actual*) *entry* will preserve the contingent uses.³

It will be necessary to state fully the case of Wigg and Villers,⁴ and the resolutions upon it.

" If A. seised of land in fee covenants for natural affection to stand seised to the use of himself for life, the remainder to his wife for life, the remainder to B. his daughter for life, the remainder to the first son to be begotten of the body of B., and after to divers other sons of B. in like manner, the remainder to his right heirs; and after A. grants his reversion in fee to J. S. to the use of J. S. and his heirs, but without any consideration, reciting in the deed the said uses, by which the grantee has conuance of the uses, and so he is subject to the said contingent estate, and this grant is no disturbance of them. And afterwards A. makes a feoffment in fee of the land, and then B. takes baron, and has issue a son, and then A. dies and his feme enters, and after B. dies, and then the feme dies so seised. In this case [246] the *contingent use to the first son of B. is not destroyed, but he may enter; for the feoffment of A. was a forfeiture of his estate, and of the estate of his wife in remainder during the coverture, so that B. might have entered for the forfeiture during the coverture; and so B. had a right of entry, which was sufficient to support the contingent remainder to the first son, &c., without question. But the case had been more dubious if B. had not had any estate for life, but that the contingent remainders had depended on the estate of the wife immediately, where the feoffment of the baron had destroyed them, inasmuch as the feoffment of the baron passed his estate,

³ See 22 Vin. 225, pl. 3, and cases in the note.

⁴ 2 Roll. Ab. 796. 22 Vin. 228, 229, 230.

and the estate of the wife during the coverture ; so that none can enter during the coverture, and so neither the estate of the baron nor of the wife *in esse* during this time, to support the contingent uses. But this doubt does not come in question in this case, inasmuch as B. had an estate for life in remainder, which was only divested by the feoffment, and turned to a right, and she had a present right of entry for a forfeiture. And when A. the baron died, and his wife entered, this reduced her estate for life, and the estate of B. for her life ; and so the contingent use reduced also, and vested by force of the statute of uses, in the first son of B.

" In the debate of this case between me and my brothers Nicholas and Aske, it was agreed and resolved, that if a feoffment be made by A. and B. in fee to the use of A. for life, the remainder to C. *for life, [*247] the remainder to the eldest son of C. in tail, with diverse contingent uses after in remainder, the remainder to the right heirs of A. in fee ; that in this case the feoffment of A. will not destroy the contingent uses, because the remainder to C. though it be divested, yet he shall have a right of entry for a forfeiture, and a right to the remainder, which is sufficient to support the contingent uses ; for this is the common assurance upon marriages and the common practice.

" And it was also agreed and resolved by us, That in the said case, if C., who is in remainder for life, enters into the land, either in the lifetime of A. or after his death, this shall reduce the contingent remainders, so that if a son be born in his life, his contingent estate shall be settled and executed by the Statute of Uses, without any re-entry by the first feoffees ; for this is an incident of the first livery.

And it was also resolved and agreed between us, That if, after the feoffment of A., C. had not entered, but died before entry, yet if the first son of C. was born in his life, he cannot enter, though his contingent estate is not destroyed, because this was not executed in the life of C. ; the estate of C. being turned to a right, and so the contingent disturbed. But in this case the first feoffees may enter to revive this contingent use, and then by

their entry the contingent use shall be settled and executed in the first son by the Statute of *Uses; [*248] for there is a *scintilla juris* in the feoffees to enter, in such cases of necessity, to revive contingent uses; for otherwise the contingent use would be destroyed.

" It was also agreed and resolved by us, That when a feoffment is made to certain uses, with divers remainders over in contingency, and no estate left in the feoffees, and after the feoffees enter into the land and disseise the tenant in possession, and make feoffment in fee, that this does not destroy the contingent uses, if the tenant in possession or any in remainder, in whom an estate certain was settled before the feoffment, re-enters; for his re-entry shall reduce all the contingent remainders, and shall make them capable of execution by the Statute of Uses; for the feoffees are but conduits to convey the estates, and have not any power left in them to destroy any contingent uses.

" It was also agreed and resolved by us, That when a feoffment is made to certain uses, with diverse remainders over in contingency, and no estates left in the feoffees, yet if the estates *in esse* are divested, either by disseisin or by feoffment, or otherwise, before the contingents happen, and after the contingents happen, during the divestment, and after the estates *in esse* determine before any re-entry; if the feoffees release all their right in the land, or make feoffment of the land, or bar their entry by any other way, in this case *the contingent [*249] can never be revived to be executed by the Statute of Uses, because the feoffees, who had *scintillam juris* in them, in case of necessity to revive the contingent uses, have barred their entry to revive the contingent uses, and no other can revive them, so that they cannot be executed by the statute."

(2.) Uses limited of copyhold lands are not within the Statute of Uses;⁵ for if such uses were permitted to be

⁵ Co. Copy. sec. 54. Cro. Car. 44. 2 Ves. 257. [But although uses limited of copyholds are not within the Statute of Uses, surrenders of copyholds so far differ from common law conveyances, that shifting or springing uses may be limited by them so as to have the effect of divesting prior vested estates. In the case of *Boddington v. Abernethy*, 5 Barn. & Cress. 776, where a copyholder in fee surrendered to the uses of a prior settlement, which contained a power to

[*250] limited on conveyances of *copyhold estates, there would be a transmutation of possession by the sole operation of the law; which would be contrary to the nature of copyhold tenure. It is a principle of that tenure, that the lands cannot be aliened without the consent of the lord.

(3.) As the statute 27 Hen. 8, c. 10, was made previously to the Statute of Wills, 32 & 34 Hen. 8, it seems to follow, that the former does not extend to *devises* to uses; for a statute cannot be considered to extend to anything which at the time of the making of it did not [*251-2] exist.⁴ But as *the testator's intention is generally the guide in *cases of devises, it has been

revoke the uses therein declared, and limit new ones, it was held that uses limited in execution of this power were good. And in the case of the King v. the Lord of the Manor of Oundie, 1 Adol. & El. 283, where a copyholder in fee surrendered to such uses as A. should appoint, and in default of and until such appointment to the use of A. in fee, and A. without having been admitted, made an appointment; it was held that such appointment was a good execution of the power, and entitled the appointee to be admitted under the original surrender. In the latter of these cases the surrenderor remained tenant until an admittance under the surrender. This case, however, is not to be cited as an instance of a substitution in the tenancy without a surrender, or without the consent of the lord; since the substitution took place under an express limitation in the surrender to uses; and the acceptance by the lord of that surrender was an implied consent to all the tenancies created by it.

Where uses are limited of copyhold lands by will, the probate copy of the will is sufficient to guide the uses of the surrender. Archer v. Slater, 10 Sim. 624.]

⁴ Sid. 26, in Hore v. Dix. Note, 1 Co. Litt. 271, b. under fol. 277, a. [But see 1 Atk. 589, 1 Ves. 143, 1 Ves. jun. 255, 2 Bos. & Pull. 311, where it appears to have been assumed that devises to uses were within the Statute of Uses.]

Uses limited upon a seisin created by devise, are no doubt executed and become legal estates; and whether they be executed by the operation of the Statute of Uses, or by virtue of the principle of decision in courts of justice, which gives effect to the devisor's intention, is of no real practical importance. The position, however, that an act cannot extend to anything not existing at the time of its passing into a law, is too generally stated. The author thinks it necessary to subjoin the following extracts from Vernon's case, 4 Co. 4, a. "Note, reader, in the said case reported by the Lord Brook, it is further said, that a devise of land by the husband to the wife by will, is no bar of her dower, for it is a benevolence and not a jointure, *per justiciam*, as it is there reported; and that is good law, if it is well understood. And as to that, some have said, that no estate devised by will can be a jointure within 27 Hen. 8, c. 10, for two reasons: 1. That by the said act of 27 Hen. 8, the whole estate of the feoffees was transferred to *cestus que use*; and *per consequens*, no land after the making of that act was devisable till the statute 32 Hen. 8, and therefore a devise of land, which then by the law could not be made, cannot be within the said act 27 Hen. 8. The other reason was, because every jointure intended within the act 27 Hen. 8, is made and assured either before or during the coverture, as appears by the said act, but a devise takes its effect after the husband's death: but that neither of these is any reason in law, appears by the resolution following. Mich. 38 and 39 Eliz., between Leak and Randall in the Court of Wards,

repeatedly *determined,' that if A. devise to B. [*_253] and his heirs to the use of, or in trust for C. and

it was resolved by the two chief justices, and *sot cur.*, that if a man devises land to his wife for the term of her life generally, it cannot be averred to be for the jointure of the wife, and in satisfaction of her dower, for two reasons:—1. Because a devise implies a consideration in itself; and therefore as a devise cannot be averred to be to the use of another than of the devisee, unless it is expressed in the will; no more can a devise be averred to be for a jointure, unless it is so expressed in the will: but as it is said in the said case, 6 Edw. 6., it shall be taken for a benevolence, and so is the said case of 6 Edw. 6, to be intended. 2. The whole will concerning lands by the statutes of 32 and 34 Hen. 8, ought to be in writing, and no averment ought to be taken out of the will which cannot be collected by the words contained in the will. But if a man devises land to a woman for term of her life or in tail, &c., for her jointure, and in satisfaction of her dower, it was resolved, that it is a jointure within the act of 27 Hen. 8: for as an estate for life made to a woman for her jointure before marriage, when she is not his wife, is within the equity of the said act, so an estate for life devised to a woman for her life, which takes effect after his death, when the marriage is dissolved, is also within the equity of the said act, for such estate well agreed with the intent of the makers of the said act of 27 Hen. 8, and with the said description of a jointure made by the justices in the said case of Vernon. And although land was not devisable until 32 Hen. 8, yet it is frequent in our books, that an act made of late time shall be taken within the *equity of an act made long time before.*"

Sir Edward Coke then proceeds to state several instances establishing this construction. See also 2 Lord Raym. 1028, in Sir Wm. Moore's case. 22 Vin. 210, pl. 7, and note.

[On the question whether the Statute of Uses extends to devises to uses, see Butler's note to Co. Lit. 271(a). Sug. Pow. vol. i. p. 172, 6th ed. 1 Pow. Dev. (Jarman's ed.) 209. Powell cites various instances of the extension of statutes made touching a certain thing to another thing of the same nature, and in the same degree of mischief, though not existing until afterwards.

Uses however created, and not merely the modes of creating them, were essentially the subject of the Statute of Uses. The use was the substance—the manner in which it was created merely the form. It may be fairly asserted, therefore, that with reference to the object and operation of this statute, a use to be created by will (although not a will of land devisable by custom), was a thing as much in existence at the time of the passing of the act as a use to be created by any other species of instrument. The words of the statute relative to seisin to uses are sufficiently comprehensive to embrace any mode of disposition created subsequent to the statute, being, "Where any person or persons stand or be seised, or at any time hereafter shall happen to be seised of, &c., to the use, &c., by reason of any bargain, sale, feoffment, fine, recovery, contract, agreement, will, or otherwise by any manner of means whatsoever it be."

In the case of Doe dem. Cooper v. Finch, 4 Adol. & El. 283, it was assumed that the Statute of Uses operates on uses created by will. In that case Edward A., tenant in tail in possession, with remainder to his brother Thomas in tail, with remainder to himself in fee, levied a fine to his own use in fee, and devised the estates in trust for his brother Thomas for life, remainder to the use of Thomas, the son of the brother Thomas, for life, remainders to the sons of the last-mentioned Thomas successively in tail, remainder over in fee. Edward died without issue. Thomas, the brother, afterwards suffered a recovery, devised the estate to his son Thomas for life, with remainder over, and died. Thomas, the son, on his father's death, entered; and one of the points raised in the case was, that Thomas, the son, upon his entry, was remitted to the original estate tail under the settlement. But it was held, that if he entered under his father's will,

⁷ For note see next page.

his heirs, or in trust to permit C. and his heirs to take the profits, it shows that the testator intended that C. should have the *legal* estate in fee; and the law, upon this interpretation of the testator's meaning, will give the devise such an operation. But it is clear, that if there be a devise to the *use* of A. for *life*, remainder over, this cannot take effect by way of *use* executed by the statute, because there is no *seisin* to serve the use: but still the *cestui que use* will have the legal estate.

(4.) Very soon after the Statute of Uses an opinion was delivered, that though a feoffment in fee to the use of the feoffor for life, and after his decease that J. N. shall take the profits, be an *use* executed in J. N.; yet if it had been, that after his death the feoffees should receive the profits and pay them over to J. N., this would not be executed by the statute,⁷ because the legal estate must be in the feoffees in order to enable them to pay over the profits. This construction has since prevailed; and therefore if there be a conveyance in trust [*254] to pay over the profits,⁸ or to *convey,¹ or to sell,² &c., the legal estate must, in these cases, necessarily vest in the trustees.³ So it is of a trust to permit a

he adopted and was bound by the recovery; and if under the will of Edward, the uncle, he took under the Statute of *Uses*, and then the doctrine of remitter did not apply (see ante, p. 217). The circumstances of this case show that the question, whether uses created by will are within the Statute of *Uses* is not merely a speculative one, but may be of practical importance. See also Sug. Pow. vol. i. 174, et seq. (6th ed.)

The late Statute of Wills, 1 Vic. c. 26, by which the statute 32 Hen. 8, c. 1, is repealed, leaves this question open.]

⁷ 1 Vern. 79, 415. 2 Salk. 679. 2 Atk. 573. 2 P. W. 134.

⁸ 36 Hen. 8. Bro. Feoff. al. *Uses*, 52. B. N. C. 282.

¹ Symson v. Turner, 1 Eq. Ab. 383. Sylvester v. Wilson, 2 Term. Rep. 444. 15 Ves. 371; and Shapland v. Smith, 1 Bro. Cha. Ca. 75. See the case of Gregory v. Henderson, 4 Taunt. 722. [See also Doe dem. Leicester v. Biggs, 2 Taunt. 109. And so, although there be no direct devise to the trustees. Doe dem. Gratreaux v. Homfray, 6 Adol. & El. 208.]

² Roberts v. Dixwell, 1 Atk. 607. Bac. *Uses*, 8. [Doe dem. Shelley v. Edlin, 4 Adol. & El. 582. Doe dem. Cadogan v. Ewart, 7 Adol. & El. 638. Doe dem. Noble v. Bolton, 11 Adol. & El. 188. Doe dem. Davies v. Davies, 1 Adol. & El. N. S. 430.]

³ See ante, 4. Bagshaw v. Spencer, 2 Atk. 578.

⁸ [See also Doe dem. Keen v. Walbank, 2 Barn. & Adol. 554, Doe dem. Tomkyns v. Willan, 2 Barn. & Ald. 84, Houston v. Hughes, 6 Barn. & Cress. 403, Doe dem. Booth v. Field, 2 Barn. & Adol. 564, Musthwaite v. Barnard, 2 Brod. & Bing. 623, Tenny v. Moody, 3 Bing. 3, S. C. 10 B. Moore, 252, Anthony v. Rees, 2 Tyrwh. 100, Ex parte Ward, 5 Madd. 291, White v. Parker, 1 Bing. New Ca. 573, for instances where the legal estate in fee-simple was held to be vested in the trustees.]

feme covert to receive the profits for, or to pay the same to, her separate use.⁴(a)

Where a trust has been created to convey, it has been considered as a consequence, that the trustee must have a legal estate to enable him to make the conveyance, except in the case of a mere power: but it appears from a recent decision, that the rule is not universally applicable. In the case of Doe dem. Player v. Nicholls, 1 Barn. & Cress. 336, there was a devise to trustees in *trust for the testator's son, T. G. Player, of all the testator's freehold and copyhold lands; the same to be transferred to him as soon as he should attain the age of twenty-one years. It was determined that the trustees took an estate determinable on the son's attaining the age of twenty-one years; and Mr. Justice Holroyd said, that he was very clearly of opinion, that the trustees had no legal interest in the copyholds after T. G. Player attained the age of twenty-one years.⁵

Although in some cases which I shall mention in the observations which follow, the courts have considered the legal estate vested in trustees to be determinable by

⁴ Pybus v. Smith, 3 Bro. Cha. Ca. 340. Henry v. Purcell, Fearne, 57, 9th ed. Nevill v. Saunders, 1 Vern. 415. See Bush v. Allen, 5 Mod. 63. [And so of a trust to permit and suffer a party to receive and take the net rents and profits. Barker v. Greenwood, 4 Mee. & Wels. 421.]

⁵ [In this case there was no express limitation of the fee to the trustees; and it was held that the admittance of the son would operate as a transfer of the estate, and satisfy the words "to be transferred." Holroyd, J., considered the words "to be transferred," to mean "to be delivered up;" so that the decision cannot be considered as applicable to a case where there is a trust or direction to convey.

In the case of Goodson v. Ellison, 3 Russ. 583, 596, by indenture 1 June, 1767, R. Buck, and Susannah his wife, covenanted to levy a fine unto R. Ellison and his heirs of certain lands, to enure to the use of R. Buck for life, remainder to the use of R. Ellison and his heirs, upon trust to convey the same as Susannah should by deed or will appoint, and in default of such appointment, to the use of R. Buck in fee. The fine was levied, and Susannah died in the lifetime of her husband, without having made any appointment. Lord Eldon expressed a doubt, whether, on the construction of the instrument of the 1 June, 1767, the legal fee, upon the death of Susannah without executing her power, did not vest in R. Buck. In this case, however, the construction might have been that there was no trust to convey to R. Buck, but a limitation of the use to him by the instrument itself.]

(a) Lancaster v. Dolan, 1 R. (Penn.) 231; Pullen v. Rienhard, 1 Wh. (Penn.) 514. The words in a trust for a wife "for her own sole and separate use," held not to prevent the trust from becoming executed under the statute, although such was the apparent intent. Williams v. Waters, 14 Mee. & W. 166.

[*256] events, I do not remember *any case, besides Doe *v.* Nicholls, in which this has been done, where there had been a positive direction to convey. A determinable fee ceases upon the happening of a certain event without the aid of a conveyance; and a direction to convey a determinable fee in the event which destroys it, would be in itself a contradiction in terms.

It is sometimes difficult to determine the extent of the legal estate vested in trustees, under trusts of the above description; and the decided cases are not always consistent. (a)

The first point to ascertain in a case of this kind is, whether the trustees take a freehold or a chattel interest. In Trodd *v.* Downs, 2 Atk. 304, there was a devise to trustees and *their assigns* until R. and B. should attain the age of twenty-one years, and to receive the rents in the mean time for the maintenance of the said R. and B.; and after they should attain the age of twenty-one years, then to the said R. and B. during their lives, &c. It was determined, that the trustees took a chattel interest until R. and B., or the survivor of them, attained the age of twenty-one years.

So in Goodtitle *ex dem.* Hayward *v.* Whitby, 1 Burr. 228, there was a devise to T. H. and J. B., and the survivor of them, and the heirs of such survivor, in trust [*257] that they, and the survivor of *them, his heirs and assigns, should lay out the rents and profits of the devised premises for the maintenance of T. and J. H. during their minorities, and when and as they should severally attain their ages of twenty-one years, then to the use of the said T. and J. H. and their heirs equally. This was determined to be an *immediate gift* to T. and J. H., with a trust to be executed during their minorities.

Upon this case it is to be remarked, that as T. and J. H. took an immediate estate, the trustees could not take any estate of freehold, and consequently they took a chattel interest only.⁶

⁶ The case was determined on the principle of Boraston's case, 3 Co. 19, b. Mansfield and Dugard, 1 Eq. Ab. 195. Doe *v.* Lea, 3 Term Rep. 41.

(a) The rule in Shelly's case does not apply to executory trusts, whether created by deed or will. Berry *v.* Williamson, 11 B. Mon. (Kentucky,) 245.

In the case of Doe on the demise of White *v.* Simpson,⁷ there was a demise of real estate to trustees and the survivor of them, and the executors and administrators of such survivor in trust, “*out of the rents and profits of the said estate and the arrears due,*” to pay certain annuities, and a gross sum of 800*l.*; and from and after payment of the said annuities and the said sum of 800*l.*, the testator devised the estate to his brother William for life. Lord Ellenborough said, that he and the other judges were of opinion, “that the trustees took an estate by implication for the lives of the annuitants, with a term of years in *remainder for the purpose of raising the sum of [*258] 800*l.*; and that after those trusts were satisfied, the several limitations for life and in tail, took effect as legal limitations.”⁸

There is probably some error in the report of this case as to the expression, “*term of years.*” Lord Ellenborough, it is conceived, meant a chattel interest, for that interest which is in its nature uncertain, can never with propriety be called a term of years.

When it is necessary that an estate of freehold should vest in the trustees, the general rule is, that the legal estate shall be carried so far only as is proper to give effect to the intention of the testator.⁹ (a)

*In the case of Jones *v.* Say and Sele⁹ (which Lord Kenyon said was a case by itself,¹) there

⁷ [5 East, 162, 174.]

⁸ See Doe dem. Woodcock *v.* Burthorp, 5 Taunt. 382; [and 1 Marshall, 90, 91.] Robinson *v.* Gray, 9 East, 1. [The rule by which the trust estate is held to determine with the time for performance of the trusts, is subject to this qualification, that the restriction must be consistent with the words of the instrument, and the apparent intention of the maker. Doe dem. Shelley *v.* Edlin, 4 Adol. & El. 582—589. Doe dem. Cadogan *v.* Ewart, 7 Adol. & El. 636—666. Doe dem. Davies *v.* Davies, 1 Adol. & El. N. S. 437. When there are no words in the will which give the trustees any estate beyond the time during which the trust is to be performed, then the case falls within the general rule, that a trust estate is not to continue beyond the period required by the purposes of the trust. (1 Barn. & Cress. 344. 1 Adol. & El. N. S. 437.) And if the devise be for purposes which are to last only for a certain time, the use of the word “heirs” will not give a fee; the devise will be cut down to the time necessary for the purposes. But if a fee be given in terms, with trusts which by their nature extend over an indefinite time, it is not so. If no particular time can be fixed at which the trusts shall end, the estate cannot be cut down. 1 Adol. & El. N. S. 437, 438. See post, pp. 270, 271, n. (3.)]

⁹ 8 Vin. 262, pl. 19. 3 Bro. Par. Ca. 113. S. C. 1 Ves. 144. S. C. cited.

¹ 7 Term Rep. 654.

(a) Norton *v.* Norton, 2 Sandf. Sup. Ct. (N. Y.) 296; Cleveland *v.* Hallett, 6 Cush. (Mass.) 403.

was a devise of manors and other hereditaments to trustees and their heirs, in trust, out of “*the rents, issues and profits*,” to pay the several legacies and bequests therein after mentioned: then follow bequests of annuities and pecuniary legacies; and after reimbursing the costs and expenses of the trustees, and paying the annuities and legacies, in trusts to pay all the residue of the rents and profits to Cecil Fiennes, during her life, for her separate use; and after her death, the trustees were to stand seised of the premises, to the use of the heirs of her body, *subject to the payment of the annuities and legacies*. It was determined that the legal estate vested in the trustees, during the life only of Cecil Fiennes, and that the limitation to the use of the heirs of her body carried the legal estate.

In *Shapland v. Smith*, 1 Br. Ch. Ca. 75, there was a devise to trustees upon trust, that they, their heirs and assigns, should yearly by quarterly payments out of the rents, after paying taxes, pay such clear sum to C. S. for life, and after his decease to the use of the heirs male of [*260] *his body; and it was held, that the legal estate vested in the trustees during the life of C. S.³

It is presumed, that in the cases of *Doe v. Simpson*, and *Jones v. Say and Sele*, the ground of determination was, that the words “*rents and profits*” did not create a trust for sale of the devised estate:⁴ for it seems to be clear upon principle, as well as authority, that where a trust authorizes the trustees to sell, the legal estate in fee-simple must necessarily vest in them, in order to enable them to perform their trust.

In *Bagshaw v. Spencer*,⁴ the devise was to several trustees, their heirs and assigns, upon trusts, out of the rents, or by sale or mortgage, to pay the testator’s debts; and after payment thereof, the testator devised the same estates to three of the same trustees for a term of years, and after the determination of the said term, he devised the same estates to all the trustees and their heirs upon

³ See *Silvester v. Wilson*, 2 Term Rep. 444.

⁴ Perhaps the words “*and arrears due*,” in the one case, and “*subject to the annuities and legacies*,” in the other, were considered as explanatory of the testator’s intention to confine the words, rents and profits, to *annual rents*.

⁴ 2 Atk. 570, 577. 1 Ves. 142, 144, S. C. 2 Burr. 918, S. C. cited.

certain trusts, Lord Hardwicke said, “The devise is to trustees and their heirs, which carries the whole fee in law; the devise to sell would have carried the fee, if the word *heirs* *had not been mentioned.” “In the [*261] present case, the whole fee being devised to the trustees no legal fee could be limited upon it.”

In Gibson *v.* Rogers,⁵ there was a devise of freehold, leasehold, and personal estates to trustees, their “*executors, administrators,*” and assigns, in trust to pay certain annuities and legacies out of the rents and profits of the personal estate; and if that should be deficient, then out of the “*rents and profits*” of the real estate; and as to the residue of the real and personal estate, after provision for payment of the annuities and legacies, the testator gave the same to the children of Francis Gibson. Lord Hardwicke, in this case, thought, that the words *rents and profits* would authorize the trustees to sell the real estate; and that the legal estate in fee-simple vested in the trustees.

So, in the case of Wright *v.* Pearson,⁶ in which Henry Rayney, by his will bearing date the 2nd May, 1727, devised his estate at Darsfield and Royston, in the county of York, to George Wright and Joseph Bateman, and their heirs and assigns for ever, in trust out of the rents, issues, and profits, to raise 500*l.* with interest, to be equally divided between his five grandchildren, and to be paid to them respectively at twenty-one, with benefit of survivorship; and subject thereto to [*262] *the use of his nephew Thomas Rayney, son of his sister Frances Rayney, and his assigns, for and during the term of his natural life, subject to his qualifying himself as thereafter mentioned, remainder to trustees to support contingent remainders, remainder to the use of the heirs male of the body of the said Thomas Rayney, lawfully to be begotten, and their heirs: provided that in case his said nephew Thomas Rayney should die without leaving any issue male of his body living at his death, then and in such case he subjected the premises to the payment of 100*l.* each to his two nieces, Frances and Priscilla Rayney, daughters of his said sister, if then

⁵ Amb. 93.

* 1 Eden, 119. [S. C. Ambler (by Blunt), 258.]

living, payable at twenty-one, with benefit of survivorship ; and he enabled his said trustees, after the death of his said nephew, to raise and pay the same. Upon the question as to the legal estate, the Lord Keeper (Hensley) made the following observations : “ It is said the trustees had only a chattel interest *quoique* the debts are paid ; and that, subject to that chattel, this estate is executed in *Thomas*, with remainders over. Carter *v.* Barnardiston, 1 P. W. 505, has been quoted for this purpose. In that case Sir Michael Armine, 30th March, 1668, devised, that in case his personal estate should not be sufficient to pay his debts and legacies, then his executors should receive the profits of his whole real estate for the payment of his debts and legacies ; and after these should be paid, he devised, &c. The lords, with [*263] the advice of the judges, were of opinion *that the executors had only a chattel interest ; and Hitchens *v.* Hitchens, 2 Vern. 403, is to the same effect.

“ But these cases do not, in my opinion, apply to the present, and warrant the conclusion ; for in these two cases the estate devised was an uncertain interest, and therefore a chattel. But whenever a certain express interest is devised, I conceive it not to be in the power of this court, by construction, to make the devise pass any other interest than is expressed. For instance, a man devises his lands and tenements to J. S. for twenty years, for the payment of his debts and legacies only, and after payment thereof to J. B. and his heirs. After payment, this court will declare the term to be a trust for J. B., and to be assigned accordingly ; but the court cannot declare that the term determined with payment. So if it had been a devise to J. S. for life, the court cannot make it a chattel, much less can it be done in case of a devise in fee ; for such construction would change the trustees contrary to the testator’s intent.

“ The testator intended that the devisee and his heirs should execute the trust ; can the court say, No, we will transfer it to the executors ?

“ In the case of the Earl of Bath, reported by the name of Bosworth *v.* Farrand, Carter, 97, William, Earl

of Bath, had, by fine and deed to *lead the uses, [*264] limited lands to the use of Francis Lord Russel, and others, trustees, and their heirs, after the death of the earl, to raise for the daughters of Lord Fitzwarren 4000*l.* apiece. The question in that case was, whether those lands were within a power of jointuring. Bridgman, C. J., in giving his judgment, fol. 107, says thus: ‘I shall not need to prove the whole fee-simple limited to the trustees, till the portions raised, though he that argued first seemed to be of opinion that all was but a chattel; but it is clear it is a fee-simple. If land be conveyed to the use of A. and B. and their heirs till 1000*l.* be raised, it is a fee-simple conditional.’ I must not construe the will in that sense, for then I should make the remainders over void, as nothing can be limited after a fee; but I must take it as a devise to trustees of a pure fee, subject to trusts for divers persons. That reasoning was confirmed by Lord Hardwicke, in *Bagshaw v. Spencer*; though indeed, in that case, there was the additional circumstance, that the trustee might sell.”

So, in a recent case,⁷ there was a devise to trustees and their heirs,⁸ of real estates, in trust to demise or let all the testator’s freehold estates for any term they should think proper, and to pay one-third of the rents to the testator’s wife for life, and the remaining two-third parts of *such rents, and after the decease of the wife, [*265] the first-mentioned one-third part, to the testator’s daughter for life for her separate use independently of her husband; and after the death of the daughter, the testator bequeathed all his freehold estates to her children, equally to be divided among them at their respective ages of twenty-one years. This was held to be a devise of the legal fee to the trustees, and not a mere power of leasing, nor a determinable fee.

In the late case, however, of *Warter v. Warter*, 2 Brod. & Bing. 349,⁹ the uniformity of these determina-

⁷ Doe dem. Tomkyns *v. Willan*, 2 Barn. & Ald. 84.

⁸ [See also same case in Kings’ Bench (under the name of *Warter v. Hutchinson*), 1 Barn. & Cress. 721, 750, where the judges certified that the trustees took only a chattel interest in the estates devised to them. But the decision in this case turned on the particular circumstances, the limitations being very complicated. And it was therefore considered in a subsequent case in which the limitations

tions seems to have been interrupted. In that case Thomas Meredith, by his will dated the 8th of September, 1801 (after directing payment of his debts and funeral expenses,) devised his capital and other messuages, tenements, lands, and hereditaments, with their respective appurtenances, charged with two annuities, to trustees, their heirs and assigns, until his nephew, John Warter, the son of his sister Margaretta Warter, should attain [*266] the age of twenty-one years; and *if he should die in the mean time, until Henry Warter, the second son of the said Margaretta Warter, should arrive at that age; and if the said Henry Warter should die in the mean time, until the daughter of the said Margaretta should arrive to that age; upon trust, among other things, to raise out of the rents and profits of the premises, or by sale or mortgage thereof, or of a competent part thereof, the full sum of 2000*l.*, together with all costs and charges attending the raising of the same, and to pay the same to the said Henry Warter, the younger son of his sister M. Warter, as soon as he attained the age of twenty-one years; and, if his sister should happen to have more than one younger child, to raise out of the rents, issues, and profits of the premises, the full sum of 3000*l.*, and pay the same to and amongst such younger children, share and share alike, as soon as they should severally attain the age of twenty-one years; and upon further trust, to pay and apply a proper sum of money, arising from the rents and profits of the premises, for the maintenance and education of his nephew John Warter, till he should arrive at the age of twenty-one years; and when John Warter should attain that age, to pay him the residue of the rents, issues, and profits of the premises, if any should remain after performance of the before-mentioned trusts; and if John Warter should happen to die before he attained the age of twenty-one years, then to pay and apply a sufficient sum of the [*267] *money arising from the rents and profits of the premises, for the maintenance and education of

were in some respects similar to those in *Warter v. Hutchinson*, that such decision was not sufficient to vary the general principle; and it was held in this latter case, that the trustees took the fee. *Doe dem. Cadogan v. Ewart*, 7 Adol. & El. 636.]

his nephew Henry Warter, till he should attain the age of twenty-one years; and when Henry Warter should arrive at that age, then upon trust to pay him the rest and residue of the rents, issues, and profits of the premises, if any should remain after performance of the before-mentioned trusts; and, in the mean time, to place out the money arising from the rents and profits of the premises at interest for the benefit and advantage of his said nephew; and when and as soon as John Warter should attain the age of twenty-one years, or, in case of his death, when and as soon as Henry Warter should arrive at that age, or, in case of his death, when and as soon as the daughter of Margareta Warter should arrive at the age of twenty-one years, he gave and devised the premises, with their respective appurtenances, subject as aforesaid, to the said trustees, their heirs and assigns, to the use of his nephew John Warter, and his assigns, for life, *sans* waste; remainder to trustees to preserve contingent remainders; and, after the decease of John Warter, to the use of the first, second, third, and all and every other son and sons of the body of John Warter lawfully issuing, severally and successively in tail male; with remainder to his first and every other daughter successively in tail; with remainders over. John Warter died under the age of twenty-one years, leaving a widow, Jane Warter, and also Margareta Elizabeth Meredith Warter, his only child and heir at law, him surviving.

*The Judges of the Court of Common Pleas [*268] certified, that upon the death of John Warter under the age of twenty-one years, Margareta Elizabeth Meredith Warter, his only child, became, and is now, entitled to the devised estate and premises, as tenant in tail male of the *legal* estate.

From this certificate it is clear that the Judges did not consider the legal estate in fee-simple to have been vested in the trustees, although there was an express trust to sell or mortgage.⁹ The same construction seems to have been adopted in *Hawker v. Hawker*, 3 Barn. & Ald. 537. It is possible, that in both cases the judges

⁹ [See ante, page 260, and note 3.]

considered the trust to sell or mortgage, in the nature of a power; for if a purchaser or mortgagee were to derive title from the estate vested in the trustees, under the trust to sell or mortgage, that estate must necessarily have been an absolute fee-simple: for if the legal fee, when vested in the trustees, was in its nature determinable, the purchaser, deriving title under them, must take an estate commensurate to that which the trustees held, and his estate would therefore be also determinable.

But where an estate is devised to trustees and their heirs, the legal fee-simple may be made determinable in a certain event, by way of executory devise: but as Lord [*269] Hardwicke observed *in the case of *Bagshaw v. Spencer*, an executory devise after payment of debts would be void, as being too remote.

In *Wellington v. Wellington*,¹ there was a devise to J. A. and J. S. and their heirs, in trust to pay E. W. an annuity of 100*l.* till the testator's debts and legacies were paid; and after payment thereof, the testator devised to E. W. for life, &c.: and it was decided that the trustees took a base fee, determinable on the payment of the debts and legacies out of the profits of the estate. This case, therefore, seems to be directly opposed to the opinion of Lord Hardwicke in *Bagshaw v. Spencer*, and seems at variance with the acknowledged principles by which the limits of springing uses and executory devises are fixed by the policy of the law relating to perpetuities.

In the case of *Brownsword v. Edwards*,² Francis Brownsword devised the premises in question to two persons and their heirs, to receive the rents and profits until that little boy, commonly called John Brownsword, should attain twenty-one, which would be 14th October, 1746; in trust in the mean time, and from time to time, to place the same out at interest for the improvement of the estate; and if he should live to attain the said age of twenty-one, or have issue, then to the said John Brownsword and the heirs of his body:

¹ W. Black. 645, and 4 Burr. 2165.

² 2 Ves. 243.

*but if the said John Brownsword should happen [*270] to die before the age of twenty-one, and without issue, then and in the same manner he devised it to the same persons in trust, till that little girl, commonly called Sarah Brownsword, should attain the age of twenty-one, which would be at such a time; but if she should happen to die, &c., exactly in the same words as the former devise, then to the other collateral branches of his family; and for want of such issue, to his own right heirs for ever.

Upon that case Lord Hardwicke observed, "Having first given the whole legal fee to trustees and their heirs, he did not intend either of these two children should have any thing vested till twenty-one, or the having issue, and then to have an estate tail; consequently, as soon as John attained twenty-one, or had issue, though he died before twenty-one, that defeated and determined the estate in law given to the trustees, and vested a fee tail in him."³

* [In *Heardson v. Williamson*, 1 Keen, 33, estates were devised (subject to annuity of 10*l.* to Margaret King, and to the payment of 100*l.* yearly till certain mortgage debts were paid off, in case the produce of other estates directed to be sold for that purpose should not be sufficient to pay off the same), to testator's wife for life; and from and after her decease, "in case the said mortgage debts so directed to be discharged should not then have been fully paid off," the testator devised the same estates to trustees and the survivor of them, and the executors and administrator of such survivor in trust to let the same for the best rents that could be obtained, and apply such rents for the payment of the said mortgage debts, should any part still remain, until the whole should be fully paid off and discharged by the gradual receipt of such rents and profits; and from and after the decease of his said wife, or the final liquidation or payment of his mortgage debts as aforesaid, the testator devised the said estates to his son, the plaintiff, for life, and after his decease to such child or children as the said plaintiff should have lawful issue of his body, and to their, his, or her heirs or assigns for ever as tenants in common. The plaintiff, after the death of the wife, executed a conveyance for the purpose of destroying the contingent remainders to the children, and acquiring the fee-simple to himself and his heirs, and afterwards contracted to sell; and the question upon a bill for specific performance was, whether the above conveyance was effectual to destroy the contingent remainders, and that depended upon the quantity of estate which the trustees took; for if they took a fee, the contingent remainders would be supported by it and preserved. The Master of the Rolls in giving judgment said, "The question here raised is, whether the trustees under this devise take the legal fee. There can be no doubt that the circumstance of the estate being limited to the trustees, their executors and administrators, would not affect the vesting of the fee in the trustees, if the purposes of the will required it; and the question is, whether the purposes of the will did require that the trustees should take the fee. If the mortgage debts had been paid off in the lifetime of the widow, the trustees would have taken no estate after the decease of the widow; and in the event which happened of the mortgage debts not having been wholly paid off in her lifetime, they were to take only an estate until those debts

[*271] When trustees are appointed to preserve *contingent remainders, and their estate is not by express terms confined to the life of the tenant for life, [*272] after whose estate the contingent remainders *are to take effect, it sometimes becomes a question, which I apprehend, both in wills and deeds, is determined upon intention, whether the trustees take the fee-simple, or an estate *per autre vie* only.⁴

were paid. I do not see the least necessity that for that limited purpose the trustees should have the reversion; and the debts having in fact been paid off, I am of opinion that the trust ceased, and that the legal estate vested in the plaintiff."

For other cases where the trustees have been held to take only a limited interest or a determinable fee in the legal estate, see *Glover v. Monkton*, 3 Bing. 13, and *Doe dem. Brune v. Martyn*, 8 Barn. & Cress. 497. S. C. 2 Mann. & Ry. 485, 499. *Ackland v. Pring*, 2 Man. & Gr. 937. See also *Hawkins v. Luscombe*, 2 Swanst. 375.]

Now, by the statute 7 Will. 4, and 1 Vic. c. 26, entitled "An Act for the Amendment of the Laws with respect to Wills," it is enacted (sec. 30), "That where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee-simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication." And by section 31, it is enacted, "That where any real estate shall be devised to a trustee without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial life interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee-simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied."

⁴ [The weight of authority appears to be against extending to uses and trusts declared by deed, that latitude of construction which is allowed in the case of wills. See *Stratton v. Best*, 2 Bro. C. C. 233. *Wykham v. Wykham*, 18 Ves. 395. *Parkhurst v. Smith*, Willes, 332. *Colmore v. Tyndall*, 2 Yo. & Jerv. 605. *Nash v. Coates*, 3 Barn. & Adol. 839. *Chambers v. Taylor*, 2 My. & Cr. 376. The particular point mentioned in the text is adverted to in Butler's note to *Co. Lit.* 290, b.; and it is there stated as the apparent result of the cases, that in a deed the trustees would certainly be considered as taking the whole fee. And the point was so decided in *Colmore v. Tyndall*. In that case the Lord Chief Baron (Alexander) alludes to the well known distinction (with regard to construction) between a deed, and a will, where the party is supposed to be, and frequently is, *inops consilii*: and he held it not to be a sufficient ground for restricting the estate given to the trustees, that such estate seemed to be larger than was essential to its purpose. In the case of *Curtis v. Prior*, 12 Ves. 89, there was a term for years immediately after the limitation in fee, and given to the same trustees; and therefore the term could not have arisen at all if the trustees had taken the whole fee. On the other hand, in *Venables v. Morris* (cited *supra*), it was decided that the fee was in the trustees throughout, because a party to whom a prior life estate was given, with a power of appointment, might in the execution of that power make contingent limitations, to support which it was necessary that the trustees should have the legal fee: (see however Lord Eldon's observations on this point, 18 Ves. 422). All that these decisions appear to establish is, that in the case of a deed, the estate given to the trustees will be restricted, where,

In Doe dem. Compere *v.* Hicks, 7 Term. *Rep. [*273] 433, there was a devise of lands to A. C. for life, with remainder to John Compere for life, and after the determination of that estate to trustees and their heirs (not in words confining the estate to the life of John Compere), in trust to preserve contingent remainders; and after the decease of John Compere, to the first and every other son of John Compere successively in tail male; and in default of such issue, to Anthony C. for life; and after that estate determined, to the said trustees and their heirs, in trust to preserve contingent remainders; and after his decease, to his first and other sons successively in tail male, with remainders over. It was decided upon the ground *of intention, that [*274] the trustees did not take the fee, but during the life only of each tenant for life.

In the case of Venables *v.* Morris, 7 Term Rep. 342, 439, an estate was settled by deed and fine to the use of J. M. for life, with remainder to trustees and their heirs, during the life of J. M., to preserve the contingent remainders, with remainder to H. M. for life, with remainder to trustees and their heirs (generally) to preserve contingent remainders, with remainder to the first and other sons of J. M. and H. M. successively in tail, with remainder to the appointees by deed or will of H. M., and in default of appointment to her right heirs. It was determined that, subject to H. M.'s life estate, the trustees took the absolute fee-simple; and Lord Kenyon, *ibid.* 437, observes, it was absolutely necessary the trustees should take the fee; for H. M. had a power of appointment, and if in exercising that power she had introduced any contingent remainders, they might all have been defeated if the use were not executed in the trustees.

In Boteler *v.* Allington, 1 Bro. Chan. Ca. 72, there was a devise to J. B. for life, with remainder to trustees and their heirs during his life, in trust to preserve contingent remainders, with remainder to P. B. for life, with remainder to trustees and their heirs (generally) in trust

otherwise, the intention of the settlor, to be collected, not from the nature of the limitation itself, but from other parts of the instrument, might be defeated.]

to preserve contingent remainders, with remainder to the first and other sons of P. B. successively in tail male, [*275] with *reversion to the testator's heirs. It seems that the Lord Chancellor Thurlow considered the legal estate in fee-simple to be vested in the trustees; but Lord Kenyon, 7 Term Rep. 437, has observed, "The case of Boteler *v.* Allington ought not to be relied on as an authority, because it was an amicable suit, and the bill was filed merely to remove all doubts."

Lastly, it is proper to refer to a case where there was a devise to trustees and their heirs, in trust to permit a feme covert to receive the rents and profits for her separate use for life, and after her decease, *to the use* of the first and other sons of her body, &c., with other limitations over, in default of issue, for the *separate use* of other *femes covert*; it was determined, that the legal estate *in fee-simple* vested in the trustees.^{5(a)}

(5.) As the statute says, that when any person or persons stand *seized* to the use of another, &c., it has been resolved, that a term of years or other chattel interest, cannot be limited to a use.⁶

(6.) When the courts of law, after the statute of Hen. 8, took cognizance of uses, they held that no use limited upon a use could be executed by the statute; and therefore if there be a conveyance to the use of A. and his heirs, to the use of B. and his heirs, this use cannot be [*276] executed in *B.⁷ So if land be limited to A. and his heirs to the intent *or in* trust, that B. and his heirs may receive a rent thereout *to the use* of C. and his heirs, the legal estate in the rent will vest in B. by the fifth clause of the statute;⁸ because the seisin, out of which the rent arises, is conveyed to A., and upon the limitation of such rent to B., the statute is satisfied. There has been, however, an exception, and I believe only one exception to this rule. A recovery was suffered

⁵ Harton *v.* Harton, 7 Term Rep. 652. 2 Swanst. 391, note a.

⁶ Bac. Uses, 42.

⁷ 36 Hen. 8, B. N. C. 284. Tyrrel's case, Dyer, 155. a. Samback *v.* Dalton, Tothil, 1 Atk. 591.

⁸ Chaplin *v.* Chaplin, 3 P. W. 229.

(a) See Lancaster *v.* Dolan, 1 R. (Penns.) 231; Pullen *v.* Rienhard, 1 Wh. (Penns.) 514.

of lands to *the use* of A. and his heirs, yielding for the same a rent to B.; it was urged, that the rent ought to have been limited out of the estates of the recoverors, and not out of the possession of *cestui que use*; yet it was determined that the rent was well executed by the statute.⁹

*C H A P T E R III.

[*277]

OF TRUSTS SINCE THE STATUTE 27 HEN. 8, c. 10.

I. THE construction adopted by the courts of law upon the Statute of Uses obliged *cestui que* trust, entitled to a beneficial interest not executed by the statute, to apply for redress to the Court of Chancery; and the consequence of the statute has been, that the ancient use has been abolished with its inconveniences, and a secondary use has been introduced under the name of trust, modelled by the Court of Chancery after its own fashion, and being, as it is properly called, a creature of equity. The Chancery was aware of the mischiefs attendant upon uses before the statute: and, therefore, in exercising an exclusive control over these trusts, it has formed them so as to answer all the contingencies of family settlements and domestic provisions. The observation, therefore, of Lord Hardwicke,¹ that the Statute of Uses “*has had no other effect* than to add, at most, three words to a conveyance,” is not substantially correct; for by extinguishing the fiduciary existence of the use, the statute has, in effect, been the occasion of raising a system of equity, which Lord Mansfield calls² “noble, rational, and uniform,” in **the place of a system at once unjust and inconvenient.* “Trusts,” says his [*278]

⁹ Cromwell's case, 2 Co. 69, b.¹ 1 Atk. 591. [2 Jac. & W. 19, in note.]² 1 Wm. Black. 160.

Lordship, “ are made to answer the exigencies of families and all purposes, without producing one inconvenience, fraud, or private mischief, which the statute of Hen. 8 meant to avoid.”

An expression is sometimes to be found in the books, that trusts are now what uses formerly were. A use, indeed, before the statute of uses, was, as a trust since is, a fiduciary or beneficial interest distinct from the legal estate ; and so far the expression is correct ; but, abstractedly, no objection can arise to the essence or quality, either of the use or trust. It was the system, adopted with respect to uses by courts of justice, which gave rise to the necessity of passing the Statute of Uses ; and the difference between uses before, and trusts since, the statute, consists in the opposite construction adopted by the Court of Chancery respecting them ; or, as it has been said, “ there is no difference in the principles, but there is a wide difference in the exercise of them.”³

The trust occasioned by the Statute of Uses is of a permanent and general nature, or a secondary use. But the system introduced by the Court of Chancery, relative to trusts since the statute, extends not only to trusts declared upon a legal estate in fee, but to those declared [*279] upon the *estates of tenants in tail, for life, and years, and to the special trusts before noticed.

II. A trust, generally speaking, is a right on the part of the cestui que trust to receive the profits, and to dispose of the lands in equity.⁴ But there may be special trusts for the accumulation of profits, the sale of estates, or the conversion of one trust fund into another, which may preclude all power of interference on the part of cestui que trust until such special trust be satisfied ; and there is a distinction between trusts executed and trusts executory.

A trust does not include every equitable interest. An equity of redemption is said to be a title in equity, and not merely a trust. In *Pawlett v. the Attorney-general*,⁵ Sir Matthew Hale observes, “ there is a diversity

³ 1 Wm. Black. 180.

⁴ 1 Mod. 17.

⁵ Hard. 465. In *Tucker v. Thurstan*, 17 Ves. 133, Lord Eldon observes, that a trust estate and an equity of redemption, are in many respects most materially different. See also post.

betwixt a trust and a power of redemption; for a trust is created by the contract of the party, and he may direct it as he pleaseth; and he may provide for the execution of it; and, therefore, one that comes in in the *post* shall not be liable to it, without express mention made by the party. And the rules for executing a trust have often varied; and, therefore, they only are bound by it, who come in in *privity of estate*. A tenant in *dower* is bound by it, because she is *in in the [*280] *per*; but not a tenant by the *courtesy*, who is in in the *post*.⁶ So all who come in in *privity of estate*, or with notice, or without a *consideration*. But a power of redemption is an equitable right inherent in the land, and binds all persons in the post, or otherwise; because it is an ancient right which the party is entitled to in equity."

III. It has been intimated, that the courts of equity, in forming a system respecting the secondary use, or modern trust, occasioned by the Statute of Uses, have endeavoured to avoid the mischiefs arising from the ancient use. It will be now necessary to state the properties of the trust estate, as distinguished from the legal seisin of the trustee, and to inquire into the rules by which trusts are governed.(a)

* [But the courts of equity now hold that the trust attaches upon the land itself, so as to convert all persons acquiring the legal interest (except a purchaser for valuable consideration without notice), into trustees; and there is no doubt that a tenant by the *courtesy* is bound by a trust. 3 Bro. C. C. 517; and see post.]

(a) The English learning on the subject of the conveyances on which a use may or may not be raised, has been for the most part inapplicable in Pennsylvania since the passage of the Act of Assembly of the 28th of May, 1715, if not for a prior period. By the 4th section of that Act, all deeds and conveyances, whatever be their forms, when they are duly recorded, have the same force and effect for giving seisin and possession, as deeds of feoffment with livery of seisin, or deeds enrolled in any of the courts of Westminster. By a feoffment with livery of seisin, a use may be raised in any one in whose favour it is expressly declared by the deed, without a consideration expressed; and therefore the same thing may be done in Pennsylvania by a bargain and sale, or any other form of conveyance duly recorded. It is in consequence of these principles established by our law in early times, that the complex and burthensome machinery of lease and release, feoffments with livery of seisin, and of fines and recoveries, adopted in England for the raising of uses, has been laid aside here, or rather has never been in common use, and the simple forms of our deeds, containing words of bargain and sale, alienation, feoffment, release and confirmation, or something tantamount, have been employed to answer all the purposes to which the former were applied in England. Per Sergeant, J., in the case of *Sprague v. Woods*, 4 W. & S. (Penn.) Reps. 194.

The same remarks are generally applicable to the States of the American Union, where statutes providing for the recording of deeds, are universal.

It is a maxim generally received, that in the construction of trusts, the courts of equity adopt the rules of law applicable to legal estates. In some cases, however, the assistance of the legislature has been required to preserve the uniformity.

[*281] (1.) If a term of years be assigned to A. in trust *for B. and his heirs, the trust of the term will, notwithstanding, be personal estate in the cestui que trust, and will consequently devolve upon his executors.⁷ The converse of this rule is also adopted. The equitable interest in a freehold estate cannot be so framed as to make it go perpetually to the executor of cestui que trust, as personal estate.

In the case of trusts executed, words of limitation, which if applied to real property would create an estate tail, will also create an estate tail in the trust or beneficial interest;⁸ and, therefore, the rule of law will prevail, although the intention of a testator, in the case of wills, may be inferred to the contrary, by his expressly restraining the equitable estate of the first taker to an [*282] estate for *life,¹ or by making it unimpeachable for waste,² or by using the word *issue*³ instead of the word heirs of the body, or by granting to the first taker a power of leasing,⁴ or by introducing a limitation to trustees to preserve contingent remainders,⁵ or by

¹ See 1 Vern. 164, and *Hunt v. Baker*, 2 Freem. 62.

² "In limitations of a trust either of real or personal estate, the construction ought to be made according to the construction of limitations of a legal estate." Per Lord Hardwicke, in *Garth v. Baldwin*, 2 Ves. sen. 646, 655. [So also per Lord Keeper Henley, in *Wright v. Pearson*, 1 Amb. (Blunt's ed.) 362. "But though it is a trust estate, yet in the case of a trust executed there ought to be no difference of construction in a court of equity, from what there is in a court of law upon a legal limitation." Where, however, trusts are *executory* merely, and the assistance of the trustees, or of a court of equity, is necessary to complete a limitation, the trusts will be executed according to the intention of the creator, although the legal construction of the limitation would be different. *Austen v. Taylor*, 1 Eden. 361, and 1 Amb. (Blunt's ed.) 376. The Duke of Bedford *v.* the Marquis of Abercorn, 1 My. & Cr. 312. *Davies v. Davies*, 4 Beav. 54. And see post.]

¹ *Shaw v. Weigh*, 1 Eq. Ab. 184, pl. 28. 8 Vin. 257, pl. 25, 26, S. C. [And even although the express estate for life be accompanied by any other of the indications of intention mentioned in the text, or by a declaration that the limitations are to be in strict settlement. See *Douglas v. Congreve*, 1 Beav. 59. S. C. 4 Bing. N. C. 1. 5 Bing. N. C. 319, and the cases there cited.]

² *Ibid. Jones v. Morgan*, 1 Bro. Cha. Ca. 206.

³ *Shaw v. Weigh*, supra.

⁴ *Bale v. Coleman*, 1 P. W. 142.

⁵ *Jones v. Morgan*, supra. *Poole v. Poole*, 3 Bos. & Pull. 620. *Wright v.*

adding after a limitation "to the heirs male of the body" of the first taker, words which denote an intention that such heirs male should take in succession according to seniority of age.⁶

(2.) Trust estates descend according to the rule of descents of legal estates; and, therefore, in the case of gavelkind and borough-english lands, trusts affecting them will descend according to the descendible quality of the tenure.⁷ There shall *be a *possessio fratris*⁸ [*283] of a trust; and where the ultimate limitation of a trust is to the right heirs of the person creating or conveying it, the heirs will take by descent, notwithstanding the grantor has no particular estate.⁹

(3.) Not only a trust *in esse*, but the possibility of a trust, may be assigned in equity;¹ and it has been determined² that a husband may dispose of the trust of a term, to which he is entitled in right of his wife;³ and it

Pearson, Amb. 358, and S. C. Fearne, 126, 9th ed.; and 1 Eden, 119. Austin v. Taylor, Amb. 376; and S. C. 1 Eden, 361.

⁶ Ibid. See the case of Brandon v. Robinson, 18 Ves. 429. An equitable tenancy for life must be subject to all the incidents of a legal estate, notwithstanding any restriction upon the tenant for life against alienation, not amounting to a limitation over. [Green v. Spicer, 1 Russ. & My. 395. Piercy v. Roberts, 1 My. & Ke. 4. Rippon v. Norton, 2 Beav. 63.]

⁷ 2 Ves. 304, in the case of Fawcet v. Lowther. Jones v. Rensbie, 22 Win. 185, pl. 7.

⁸ 2 P. W. 713, 736. [2 Jac. & W. 201, in note. With respect to *possessio fratris*, see ante, p. 63, note 5.]

⁹ Godolphin v. Abington, 2 Atk. 57. Watk. Descent, 264. See ante, 62, note 4, as to uses before the statute.

¹ Warmstrey v. Tanfield, 1 Cha. Rep. 29. 1 Cha. Ca. 8. See cases collected in note 21 Vin. 516, pl. 1.

² Tudor v. Samyne, 2 Vern. 270. Bates v. Dandy, 2 Atk. 208, note 1. [Sir Ed. Turner's case, 1 Vern. 7. Pitt v. Hunt, 1 Vern. 18. Walter & Saunders, 1 Eq. Ca. Ab. 58, pl. 5. The principles of the descent of legal estates have of late been materially altered by the act for the amendment of the law of inheritance, 3 & 4 Will. 4, c. 106; particularly in the instances referred to in the text, (see sections 5 and 6 of the act); and trust estates will now descend according to the rule of descent of legal estates established by that act.]

³ [Not, however, if the term had been assigned in trust for the wife with the privity of the husband, or if it had been a trust from himself, for the wife's benefit. Sir Ed. Turner's case, sup. and Bates v. Dandy, sup. See 3 Russ. 72, for a fuller report of the judgment in Bates v. Dandy. See also 1 Russ. 9, note b. In this note, the position that the husband may assign his wife's possible or contingent interest in a term of years, except in those cases where the possibility or contingency is of such a nature that it cannot happen during the husband's lifetime, is contested; and passages are cited from Lampet's case, 10 Co. 47, b, and Shep. Touch., from which it is inferred that the husband is unable, at law, to alien his wife's interest in a term while it continues expectant on the determination of a prior life estate. But those passages relate—not to the power of the husband over his wife's possibilities, but—to the question whether possi-

[*284] should seem, that in *case the husband shall survive his wife before such disposition made by him, he will be entitled to the trust upon the survivorship, without taking out letters of administration to the wife.*

(4.) A trust may also be devised⁵ with the solemnities required by the Statute of Frauds upon the devise of legal estates;⁶ and as copyhold estates are not within that statute, trusts declared upon them will pass by an unattested will.⁷

(5.) By virtue of the Statute of Frauds, trust [*285] *estates are made liable to executions upon judgments, statutes, and recognizances.⁸ (a)

Upon the construction of this statute it has been determined, that it does not authorize either the trust⁹ or

bilities of land are assignable at all. And it appears to be clearly settled, that the wife's contingent or reversionary interest in a term of years, where the contingency may happen in the husband's lifetime, is assignable at law by the husband, and also that such an interest in the trust of a term of years is assignable by him in equity; and that the assignment, in either case, will bind the wife surviving, although the husband dies before the contingency is determined, or the reversion falls into possession. See *Doe v. Steward*, 1 Adol. & El. 300. *Donne v. Hart*, 2 Russ. & My. 260.]

⁴ *Pale v. Michell*, 2 Eq. & Ab. 128, pl. 4.

⁵ See *Fearne*, 367, 9th ed. 1 Cha. Ca. 211, in *Cornbury v. Middleton*. 2 Vern. 680, in *Greenhill v. Greenhill*.

⁶ *Wagstaff v. Wagstaff*, 2 Cox's P. W. 258, note 1. *Adlington v. Can*, 3 Atk. 151.

⁷ *Tuffnell v. Page*, 2 Atk. 37, note 2, last ed. [1 Jac. & Wal. 570. 1 Russ. 482. Now by the act, 7 Will. 4, and 1 Vic. c. 26, every will made subsequently to the 31st Dec. 1837, whatever may be the nature of the property intended to pass by it, must be attested by two or more witnesses.]

⁸ 29 Car. 2, c. 3, s. 10, "it shall be lawful for every sheriff or other officer to whom any writ or precept is or shall be directed, at the suit of any person or persons, of, for, and upon any judgment, statute, or recognizance hereafter to be made or had, to do, make, and deliver execution unto the party in that behalf suing of all such lands, tenements, rectories, tithes, rents and hereditaments, as any other person or persons be in any manner of wise seized or possessed, or hereafter shall be seized or possessed, in trust for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the said party against whom execution hereafter shall be so sued, had been seized of such lands, tenements, rectories, tithes, rents, or other hereditaments of such estate as they be seized of in trust for him at the time of the said execution sued."

⁹ *Scott v. Scholey*, 8 East, 467. [*Metcalf v. Scholey*, 2 New Rep. 461. *Doe v. Evans*, 1 Cro. & Mee. 450.]

(a) *Rider v. Mason*, 4 Sandf. Ch. (N. Y.) 351; *Johnson v. The Conn. Bank*, 21 Conn. 148.

See *Norris v. Johnston*, 5 Barr. (Penns.) 287; *Holdship v. Patterson*, 7 W. (Penns.) 547; *Ashurst v. Given*, 5 W. & S. (Penns.) 323.

the equity of redemption¹, under a *fieri facias* at the suit of a judgment creditor.

The ground upon which the court of King's Bench in *Scott v. Scholey*, 8 East, 467, determined, that the trust of a term of years could not be taken in execution upon a *fieri facias*, appears to have been that the words “*lands, tenements, &c.*,” in the Statute of Frauds, were considered by the court as not extending to leases for years, which are a mere chattel interest saleable at common *law [^{*286}] under a *venditioni exponas*. Lord Ellenborough observes, “Lord Thurlow was at last of opinion, that an equity of redemption of a term could not be taken in execution; though at first, under an apprehension that the tenth section of the Statute of Frauds applied to such a case, he had inclined to hold otherwise. But the very silence of that statute, which, while it expressly introduces a new provision in respect to *lands and tenements* held in trust for the person, against whom an execution is sued, *says nothing as to trusts of chattel interests*, affords a strong argument, that those interests were meant to continue in the same situation and plight in respect of executions, in which both freehold and leasehold trust interests equally stood prior to the passing of that statute.”

So it was determined in *Rose v. Bartlett*, Cro. Car. 292, that when a person having freehold and leasehold estates, devised all his “*lands and tenements*,” the leaseholds did not pass.

In the late case, *Doe dem. Hull v. Greenhill*, 4 Barnw. & Ald. 684, a question arose, whether an ejectment against the *cestui que* trust of a term of years could be supported by the plaintiff, who claimed under a judgment recovered against the defendant, and a writ of *ejectus* and *inquisition* thereon taken and returned; but it does not appear from the report, that the question, whether the statute extended to the equitable interest of a *term of [^{*287}] years was particularly discussed; and it may be proper here to mention, that the statute of Westminster (13 Edw. 1, c. 18,) allows the plaintiff in an action of debt or for damages, either to have a writ of *fieri facias*

King v. Marissal, 3 Atk. 192. *Burden v. Kennedy*, 3 Atk. 739. *Lester v. Dolland*, 1 Ves. jun., 431.

directed to the sheriff, “or that the sheriff shall deliver to him all the chattels of the debtor (saving only his oxen and beasts of his plough) *and the one-half of his lands*, until the debt be levied upon a reasonable price or extent:” and upon these words, *mediatatem terrae suæ*, says Sir Edward Coke (2 Inst. 396,) “the sheriff hath extended a term of years.” This seems to be an authority, that the word “*lands*,” in the statute of Westminster 2, extends to leases for years.”³

In the case of *Lyster v. Dolland*,⁴ Lord Thurlow is reported to have said, “If this had been a mortgage in fee, he could only have extended it to hold *quousque*.”

But it seems impossible to contend, that under the Statute of Frauds the sheriff can deliver an equity of redemption upon an execution in a suit against the mortgagor: and in the case of *Plunkett v. Penson*,⁵ Lord Hardwicke is stated to have said, “I should be glad to be informed, whether there is any instance, where an equity of redemption has ever been held to be liable to the execution of a bond creditor in the life of the mortgagor:” to which the counsel in the case made answer, they could not recollect any instance where it had been so held.

From the case of *Hunt v. Coles*, Com. Rep. 226, it appears, that under this statute a judgment is not a lien upon the trust estate; and, therefore, that a purchaser for a valuable consideration and without notice, obtaining a conveyance of the legal estate from the trustee, and of the equitable interest from the cestui que trust, will not be bound by a judgment previously entered up against the cestui que trust.⁶

³ In Sir Gerard Fleetwood’s case, 8 Co. 171, a. it is said to be at the election of the sheriff to extend or sell a lease; and in *Hungry v. Fry*, Moor. 341, pl. 462, “after an *elegit*, and execution thereupon of *lands*, the plaintiff may have other *elegit* of a *term of years* or *goods*; which expression seems to distinguish between *lands* and *leases*.” Upon this subject, see *Dyer*, 363, a, pl. 24, *Palmer’s case*, 4 Co. 74, and *Rex v. Rawlins*, Bunn. 71.

⁴ 1 Ves. jun. 431.

⁴ 2 Atk. 290.

⁵ [The Statute of Frauds, 29 Car. 2, c. 3, s. 10, which enacts that lands, &c., shall be liable to the judgments, &c., of cestui que trust, only authorizes the sheriff to deliver execution of such lands as the trustees are seized of at “the time of the execution sued.” So that while a judgment binds the *legal* estate of a party from the time it is signed, it only affects such *trust* property as he is possessed of at the time of execution sued. Accordingly, in the case of *Harris v. Pugh*, 4 Bing. 335, where the trustees after judgment, but prior to an *elegit*

*(6) Previously to the Statute of Frauds, 29 Car. 2, c. 3, the trust of an estate in fee-simple [*289] was not assets at law, or in equity, in the hands of the heir of the cestui que trust to satisfy bond debts; but by the tenth section⁷ of that statute, the trust is now made legal assets.⁸ An equity of redemption is not considered a trust within the statute; *and therefore, [*290] it has been determined to be equitable,⁹ and not legal assets.¹

It seems that both previously to and since the Statute of Frauds, the trust of a term of years was considered as equitable assets in the hands of the executor;² and the statute does not now make it legal assets,³ except in

sued out against a cestui que trust for life, conveyed away the legal estate, it was held that the interest of the cestui que trust could not be taken under the *ellegit*.

In order to bring the interest of a cestui que trust in lands, &c., within the operation of the tenth section of the Statute of Frauds, it is necessary that he should be *solely* entitled to the benefit of the trust, and not in connection with other persons. *Doe dem. Hull v. Greenhill*, 4 Barn. & Ald. 684.

Now by stat. 1 & 2 Vic. c. 110, all lands and hereditaments, including those of copyhold or customary tenure, of which the party against whom judgment has been entered up, or *any person in trust for him*, was seized or possessed at the time of entering up the judgment, or at any time afterwards, may be taken in execution under an *ellegit* (sec. 11.); and by sec. 13, a judgment is made a charge (to be enforced in a court of equity) upon all lands and hereditaments of or to which the party against whom the judgment is entered up, was, at the time of entering up the same, or afterwards, seized, possessed, or entitled for any estate or interest at law or in equity; and by sec. 18, all decrees and orders of courts of equity are to have the effect of judgments. See sec. 19, and 2 & 3 Vic. c. 11, providing for the registration of such judgments, decrees and orders. See also the proviso at the end of sec. 13 of 1 & 2 Vic. c. 110, and 2 & 3 Vic. c. 11, s. 5, and 3 & 4 Vic. c. 82, as to purchasers for valuable consideration. And see p. 162, ante, n. 7.]

⁶ See *Bennett & Brownlow*, Cha. Ca. 12, 3 Vin. 142, pl. 10, 11, and the cases collected in the notes.

⁷ "And if any cestui que trust hereafter shall die, leaving a trust in fee-simple to descend to his heir, then and in every such case such trust shall be deemed and taken, and is hereby declared to be assets by descent; and the heir shall be liable to, and chargeable with, the obligation of his ancestors for and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession in like manner as the trust descended, any law, custom, or usage, to the contrary in any wise notwithstanding."

⁸ *King v. Ballet*, 2 Vern. 248. See *Robinson v. Tong*, 3 Vin. 145, pl. 28, as to the trust of an advowson in gross.

⁹ [But according to the case of *Sharpe v. the Earl of Scarborough*, 4 Ves. 538, before Lord Loughborough, C., it seems that an equity of redemption is not to be considered as equitable assets against a *judgment* creditor; a *judgment* creditor having a right to redeem.]

¹ *Plunket v. Penson*, 2 Atk. 290. [*Clay v. Willis*, 1 Barn. & Cress. 364.]

² 3 Cha. Rep. 37, in *Attorney-general v. Sands*, 21 Car. 1. Sir Chas Cox's case, 3 P. W. 341. *Hartwell v. Chittlers*, Amb. 308.

³ *King v. Ballet*, supra. [See 4 Ves. 541, 3 P. W. 344, in note, 1 Barn. & Cress. 372, 9 Barn. & Cress. 493. Before the Statute of Frauds all trust estates

the case of a term of years attendant upon the inheritance, in which case the term becomes consolidated in equity with the freehold.⁴

[*291] *(7.) It is apparent from the necessity which produced the Statute of Frauds, that the legal estate vested in the trustee could not be taken in execution upon a judgment against the cestui que trust: but it seems, that the lands of cestui que trust were always held liable to an extent for a debt due to the king.⁵ Sir Matthew Hale observes, that this rule was adopted "*per cursum scacarii*, which makes the law in such cases."⁶

The statute of 13 Eliz. c. 4, s. 5, which relates to accountants to the crown, extends to trusts by express words; and not only a trust, but an equity of redemption,⁷ may be sold under an extent issued against an accountant, by virtue of the statute of the 25 Geo. 3, c. 35, which, in order to facilitate the payment of debts due to the crown, authorizes the Court of Exchequer, in a summary way, to direct the extended lands of an accountant to be sold.

(8.) At the common law, a trust in fee-simple or in tail, was not forfeited to the crown by the attainder of cestui que trust for treason;⁸ but the statute 33 Hen. 8, c. 20, s. 2, (which extends to all manner of treasons),⁹ includes trust estates,¹ and also extends to an equity of redemption.²

[*292] *The ground of this latter decision is, that the Statute of Treasons, above noticed, has the word *conditions*; so, that if a mortgage in fee be made subject

were equitable assets, either real or personal; and that statute converted trust estates in fee-simple only into legal real estates. By the act 1 Will. 4, c. 47, s. 9, the real estates of a trader are rendered equitable assets for the payment of his debts, whether due on simple contract or on specialty; and by the act 3 & 4 Will. 4, c. 104, this provision is extended to the real estates of all persons, whether traders or not. Both heir and devisee are necessary parties to a suit under the last mentioned act. *Brown v. Weatherby*, 10 Sim. 125.]

⁴ 2 Cha. Ca. 152, in *Ratcliff v. Graves*, 35 Car. 2. This rule, which does not require the aid of authority to support it, was, however, formerly subject to controversy. See 3 Vin. 143, 144, pl. 16, 20, and the various cases collected in the notes. [1 Cro. & Mee. 450.]

⁵ Walter de Chirton's case, Dy. 180, a. 24 Edw. 3. 16 Vin. 521, K. pl. 1, notes.

⁶ Hard. 495.

⁷ *The King v. De la Motte, Forest*, 162.

⁸ See *Jenkins*, 190. Hardres, 495.

⁹ 3 Co. Rep. 11, a.

¹ Hard. 495.

² *Attorney-general v. Crofts*, 4 Bro. P. C. 136.

to a condition of re-entry, and the mortgagor commits treason before the day of payment, the king, by the forfeiture, shall have the benefit of the condition; and if the estate shall become absolute in the mortgagee in consequence of the non-payment of the mortgage-money, an equity attaches upon the mortgagee, in favour of the crown upon the same principle, that it would have attached in favour of the mortgagor in case he had not committed treason.

It is said, that a *cestui que* trust of a term of years forfeits it for felony, and upon an outlawry in a personal action.³

(9.) In the Marquess of Winchester's case,⁴ it is said, "that although an *use* were an *hereditament* (for there shall be a *possessio fratriis* of it,) yet, by the general words of all *hereditaments*, an *use* was not given to the king by an act of *attainder*." It has, however, been determined in the modern case of *Shrapnel v. Vernon*,⁵ that an equity of redemption was within the eighth section of 17 Geo. 3, c. 26,⁶ which does not comprise either the word *trust or condition. In that case Lord [293] Thurlow said, "In many acts of parliament an equitable estate is considered the same as if it were a legal estate; the words, *seised* in law or in equity, in the qualification act, show, that the word *seised* is applicable to both." He adds, "The only question is, whether the word *seisin* will extend to being *seised* of an estate in equity, which, unless I am mistaken in point of law, it will."

(10.) There may be a tenant by the courtesy of a trust of inheritance,⁷ unless the husband is excluded by an express trust for the separate use of his wife; as where lands were devised to trustees and their heirs, in trust for the separate use of the testator's daughter

³ Earl of Somerset's case, Hob. 214. Jenk. 190. Hard. 490.

⁴ 3 Co. 2, b. and see *ibid.* 10, b.

⁵ 2 Bro. Cha. Rep. 268; and see also *Tucker v. Thurston*, 17 Ves. 131, Amhurst v. Skinner, 12 East, 263.

⁶ ["An act for registering the grant of life annuities, and for the better protection of infants against such grants."]

⁷ *Watts v. Ball*, 1 P. W. 108. *Chaplin v. Chaplin*, 3 P. W. 234. *Casborne v. Scarfe*, 1 Atk. 603. [See the judgment in this case stated more fully in 2 Jac. & W. 194, n.]

during her life, and after her decease, for such persons to whom she should devise the same ; Lord Hardwicke decreed, that the husband should not have his curtesy.⁸

(11.) The Statutes of Limitations, 32 Hen. 8, c. 2, and 21 Jac. 1, c. 16, expressly extend to actions and proceedings in courts of law ; and, consequently, they do not in terms apply to suits in equity.⁹ But, as the Master of the Rolls, in *Beckford *v.* Wade,¹ observes, [*294] “Courts of equity, by their own rules, independently of any statutes of limitation, give great effect to length of time ; and they refer frequently to the Statutes of Limitation for no other purpose, than as furnishing a convenient measure for the length of time that ought to operate as a bar, in equity, of any particular demand.”

So in Llewellyn *v.* Mackworth, mentioned in the note to 15 Vin. 125, pl. 1, Lord Hardwicke observes, “The rule in this court, that the Statute of Limitations does not bar a trust estate, holds only as between cestui que trust and trustee, not between cestui que trust and trustee on one side, and strangers on the other ; for that would be to make the statute of no force at all, because there is hardly any estate of consequence without such trust, and so the act would never take place. Therefore where a cestui que trust and his trustee are both [*295] out of possession for the time limited, *the party in possession has a good bar against them both.”²

⁸ Hearle *v.* Greenback, 3 Atk. 695, 716.

⁹ [The late act 3 & 4 Will. 4, c. 27, “for the limitation of actions and suits relating to real property, and for simplifying the remedies for trying the rights thereto,” after declaring the periods within which alone the rights to real property shall in future be enforced, proceeds expressly to enact (sec. 24), “That after the 31st day of December, 1833, no person claiming any land or rent in equity, shall bring any suit to recover the same, but within the period during which by virtue of the provisions hereinbefore contained, he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest, or right, in or to the same as he shall claim therein in equity.”]

¹ 17 Ves. 87, 97. 15 Ves. 496. See upon this head, Smith *v.* Clay, 3 Bro. Cha. Ca. 639, in note, Amb. 645, S. C. [See also the observations of Lord Redesdale, in Hovenden *v.* Lord Annesley, 2 Sch. & Lef. 631, Berrington *v.* Evans, 1 Yo. & Col. 434.]

² [In cases, however, between trustee (express) and cestui que trust, the Court of Chancery does not, in ordering accounts, act strictly in analogy to the Statutes of Limitations. Attorney-general *v.* the Brewer’s Company, 1 Mer. 495. Attorney-general *v.* Mayor of Exeter, Jacob’s Rep. 448. By the 25th sec. of the act mentioned in the last note but one, the right of the cestui que trust, in cases of express trust, is not to be deemed to have accrued (i. e. the period of limita-

In the late case of the Marquess of Cholmondeley *v.* Lord Clinton, in the House of Lords (2 Jacob & Walk. 192,) there is an important observation by Lord Redesdale ; it has been argued in that case, that the Marquess of Cholmondeley might at law have had a writ of right ; but his Lordship remarked, that that was a writ to which particular privileges were allowed, but that courts of equity never regarded that writ, or writs of formedom, or others of the same nature ; that they had always considered the provision in the statute of James, which applied to rights and titles of entry, and in which the period of limitation was twenty years, as that by which they were bound, and it was that upon which they had constantly acted.

*Length of time and adverse possession will [*296] also, by analogy to the Statutes of Limitation, bar the equitable owner of a term of years assigned to attend the inheritance. If an estate be purchased by A. B. and an outstanding term be assigned to C. D., in trust for A. B. his heirs and assigns, and to attend the inheritance, the term is identified with, and follows, the possession. A. B. takes possession not as cestui que trust of the term, but as owner of the freehold and inheritance of the estate, subject to the term ; and if the inheritance or freehold, subject to the outstanding term assigned previously to the controverted rights to attend the inheritance, be contested between two claimants, the question is tried at law in respect of the freehold, independently of the outstanding term ; and the preliminary step always has been by a bill in equity to prevent the term from being set up against, or in favour of, either of the claimants : and I do not know of an instance in which a bill under the above circumstances, has been filed against the trustee of the term for the purpose of constituting him a trustee against the person in possession of the estate, who would have been the owner of

tion is not to begin to run against him) until a conveyance to a purchaser for a valuable consideration. A *constructive* trust might have been barred by long acquiescence, even as between the cestui que trust and the trustee himself, previously to this statute. As to the distinction between an express trust and a constructive trust in this respect, see *Beckford v. Wade*, 17 Ves. 97, *ex parte Hasell*, 3 Yo. & Coll. 622, *Collard v. Hare*, 2 Russ. & My. 675. *Portlock v. Gardner*, 1 Hare, 594.]

the freehold at law, in case no term had subsisted. In *Llewelin v. Mackworth* before mentioned, and as reported by Barnardiston, 449, Lord Hardwicke observes, “There is hardly any ancient family but there are long terms in the hands of trustees, and if strangers might be allowed to lay claim to them after any length of time, it might be greatly inconvenient.”

*The reasoning with respect to an estate, subject to a term assigned to attend the inheritance, will apply to an estate, subject to a term of years, for securing to a mortgagee a sum of money. The right to redeem the mortgage will follow the right to the reversion in fee, expectant on the mortgage term; for the person in possession, unless precluded by positive contract, does not claim the estate as *cestui que trust* of the term, subject to the mortgage, but as owner of the estate, subject to the term, and the money secured by it. If the person in possession insists upon his right to the freehold under the Statute of Limitations, and if that right is established at law, the right to redeem the mortgage must necessarily follow it. This point has been recently settled in the case of the Marquess of Cholmondeley *v. Lord Clinton*; first, by Sir Thomas Plumer in a very able argument,³ and afterwards by the House of Lords.⁴

(12.) Where the legal estate is vested in a trustee in fee-simple, it appears, that non-claim on a fine levied by a stranger having, and continuing in, the possession, will be a bar to the original *cestui que trust*. In *Willis v. Shorrell*, 1 Atk. 474, Lord Hardwick says, “No doubt the rules of this court (Chancery) with relation to fines, have been taken from the rules at law, and the effect is [*298] the same with regard to equitable interests, if *of such a nature, that, turned into a legal interest, it would have been barred.” So in *Wolstan v. Aston*, Hard. 511, Sir Matthew Hale observes, that a fine with proclamations, according to the 4 Hen. 7, would, if levied by a stranger, bar a trust. This principle of construction has been adopted in many cases.⁵

³ 2 Jacob & Walker, 1.

⁴ Ibid. 190. [1 Dow. N. S. 299. *Collard v. Hare*, 2 Russ. & My. 675.]

⁵ See *Thynne v. Cary*, Sir William Jones, 416, Gifford's case, 1 Freem. 311,

The case of *Basket v. Pierce* is thus reported, 1 Vern. 226 : A man, by his will, devises his lands to trustees for ninety-nine years, for the payment of his debts and legacies, and afterwards, in case they should not act and take upon them the trust within six months after his death, then he devised the said lands to another and his heirs, in trust to pay his debts and legacies, and afterwards to A. in tail, remainder in tail to B. A. levies a fine, and dies without issue. Five years pass, and *non-claim*.

The question was, whether the fine by *cestui que trust* in tail and *non-claim*, should bar the remainder-man in tail ? And the Lord Keeper was of opinion that it should : for equitable rights are as well to be barred by *fines*, as actions and titles at law.

It appears, however, that the point was not *expressly determined ; although the opinion of the [*299] Lord Keeper has been considered as an authority in subsequent cases. See 1 Eq. Abr. 256, and 9 Mod. 144. In the latter, the case is cited in the following manner : "The testator devised his lands to trustees for ninety-nine years for the payment of his debts ; and if they did not act, then he devised the lands to J. S. and his heirs, in trust to pay his debts ; and afterwards to A. B. in tail, remainder in tail to E. G. Afterwards A. B., who was the *cestui que trust* in tail, levied a fine, and died without issue, and five years passed without any claim ; it was decreed, that this fine and non-claim barred the remainder-man in tail, for equitable rights are bound by fines, as well as actions and titles at law ; and though it was insisted for the plaintiff in that case, that the title of the remainder-man was not yet commenced, because the debts were not paid, and that the term for ninety-nine years was subsisting ; and that the entire state at law being in the trustee, he ought to have entered ; and that it was against equity for him to suffer the *cestui que trust* to be barred by a fine and non-claim through his default, yet the court was still of opinion that the plaintiff was barred."

Clifford v. Ashley, 1 Cha. Ca. 268, *Salisbury v. Bagot*, 1 Cha. Ca. 278, 2 Swanst. 603, from Lord Nottingham's manuscripts. *Stapleton v. Sherrard*, 2 Vern. 212.

Notwithstanding the opinion of the Lord Keeper in the case above-mentioned, there seems at present to be a diversity of opinion upon the question, whether non-claim upon a fine levied by *cestui que trust* for life or in [*300] tail, can have any effect *upon the equitable remainder; it being contended, that a fine by a legal tenant for life or in tail has effect upon the remainder, in consequence of its displacing or discontinuing such remainder, and that a fine upon an equitable estate can have no such operation. It is argued that there is no similarity of operation in a fine acting on the legal estate for life or in tail, and a fine acting upon an equitable estate to the same extent. But I know of no case, where the operation of fines at law and in equity is similar. The fine of an equitable tenant for life is absolutely void at law; and then how can it bear any similarity of operation in equity?

It appears to me that the system of equity, with respect to the construction of fines, is raised, not from any similarity of operation in fines at law and in equity, but as a rule of convenience, with a view to make the systems of law and equity as analogous, as the nature of the subjects will allow. It is a system grounded on analogy, and not on similarity of operation. To illustrate this it may be said, that if A. an equitable tenant for life in possession, levy a fine and die, and five years' non-claim pass, the Court of Chancery would consider the person in remainder barred, because the fine would have had that operation, if levied by a tenant for life in possession of the legal estate; but if an equitable estate be settled upon A. for life, with remainder to B. for life, with remainder to C. in fee; and if B. the tenant in *remainder should levy a fine, and five years' non-claim should pass after the deaths of A. and B., the claim of C. would not be barred; because the fine would not have barred, if levied by a tenant for life in remainder of the legal estate.

The construction, that a fine by an equitable tenant for life does not create a forfeiture, is an exception to a general rule, springing from an obvious principle of justice. Forfeitures are not favoured, either at

law or in equity; and as an equitable fine is a mere creature of Chancery, having no operation at all beyond what it receives from that court, with a view to make the rules of law and equity analogous, it would be a narrow view of the subject, which, in order to preserve the analogy, should extend it to a forfeiture, which the fine could not in fact create.

IV. But the rule, that equity follows the law, has its exceptions; and in some instances the peculiarity of trusts bears no analogy to the system of property at common law.

(1.) Although the trust of an estate of inheritance is subject to curtesy, it is not to dower.⁶ It *must [^{*302}] be admitted, that there is an apparent inconsistency in this distinction, but it was adopted from motives of convenience, and not from principle. Purchasers by the advice of conveyancers, who had formed their opinion upon trusts from the ancient use, having taken their conveyances in the names of trustees for the purpose of barring dower, the courts of equity protected the purchaser at the expense of the wife's equitable right.⁷

(2.) The trust of an inheritance will not escheat to the lord upon the attainer of cestui que trust for felony,⁸

⁶ *Colt v. Colt*, 1 Cha. Rep. 254. *Bottomley v. Fairfax*, Prec. Cha. 336. *Godwin v. Winsmore*, 2 Atk. 525. *Dixon v. Saville*, 1 Bro. 326.

[The trust of an estate of inheritance is now subject to dower in equity. By the act 3 & 4 Will. 4, c. 105, s. 2, it is enacted, "That when a husband shall die, beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law; and such interest, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint-tenancy), then his widow shall be entitled, in equity, to dower out of the same land;" but the act does not extend to any widow who was married on or before the 1st January, 1834. Previously to this act, there might have been an union of the entire legal and equitable fee in the husband so imperfect, as not to entitle his widow to dower. *Knight v. Frampton*, 4 Beav. 10.]

⁷ See 1 Wm. Black. 184.

⁸ [But it has been already observed (page 291, ante,) that it is forfeitable for high treason.

In reference to this subject, it should always be borne in mind, that there is a most important difference between forfeiture and escheat—the first being a penalty of which the crown is entitled to take advantage, the second being a consequence of tenure only.

Lands may be forfeited for high treason, and also for petty treason, felony, and some few misdemeanors; but it is for high treason only that the forfeiture extends to the inheritance of the offender. In petty treason and felony, and in those few *misdemeanors for which forfeiture of lands is the penalty, the forfeiture is only partial, and does not affect the inheritance, even in the case of a

[*308] or for want of "heirs," because upon the attainder or death the trust is absolutely determined.

tenant in fee-simple; except that in the latter instance, the lands are, for petty treason and felony, forfeited to the crown for a year and a day after the death of the offender. 1 Hale's P. C. 360. In no case, however, does the forfeiture vest in the crown as a consequence of tenure. In the case of high treason, it is given to the crown by express enactment, and neither flows to it as part of its prerogative, nor attaches to it in any shape as one of the fruits of tenure; and in the case of petty treason and the other offences referred to, it belongs to the king by virtue of his prerogative merely, and without any reference to the principles of feudal tenure.

The doctrine of escheat, on the other hand, is altogether founded on feudal principles. It is a result of the theory that there must always be a tenant to the lord; and, accordingly, when the tenancy becomes vacant, the land escheats or reverts to the lord, who is supposed originally to have granted the land. Now the tenancy can only become vacant on the death, without heirs, or the attainder, and consequent corruption of blood, of the tenant; and in those cases only does the law of escheat apply. It does not apply in the case of an estate for life, because during the life of the tenant for life the tenancy is full; nor does it apply to an estate in tail with remainder to another, because on the death without heirs, or attainder, of the tenant in tail, the remainder-man becomes entitled to his formdon, (Fitz. Nat. Brev. 144, a., page 337), and there-upon enters and fills up the vacancy. It, in fact, applies only to the case of a tenant in fee-simple, or of a tenant in tail with remainder to himself in fee.

Let us now see what appears to be the result of the above principles, as applied to uses and trusts:—and first, with respect to the estate of cestui que use before the Statute of Uses, and of cestui que trust at the present day.

Before the reign of Hen. 8, cestui que use of an estate of inheritance did not forfeit his interest for high treason, nor did it escheat upon his attainder for felony committed by him (66, ante). In the hands of the feoffee to uses, however, the land was subject to both those disabilities (67, ante). The 26 Hen. 8, c. 13, made the estate of cestui que use forfeitable for high treason; but that statute did not extend to petty treason or felony. After the Statute of Uses, 27 Hen. 8, c. 10 (one of the reasons for making which is recited to be the loss occasioned to the king and lords of the tenure of their rights of attainder and escheat by the invention of uses), the land became subject both to the forfeiture and escheat of the cestui que use as the legal owner; while the treason or felony of the feoffee to uses, who was then considered to have no estate whatever in the land, no longer affected it. The cestui que use, however, might be a trustee; and in that case much the same questions, as to forfeiture and escheat, arose with respect to the estates of the cestui que trust and his trustee, as before existed with respect to those of cestui que use and his feoffee to uses.

Accordingly we find that as uses of inheritance were not forfeitable at common law, either for treason or felony, so neither were trusts, which in a manner succeeded to them; but that after the statute 26 Hen. 8, c. 13, was passed for the purpose of making uses amenable to forfeiture for high treason, it was held that trusts, as within the equity of that statute and of the subsequent statute of the 33 Hen. 8, c. 20, s. 2, were also forfeitable for high treason. Hardres, 495. Burgess v. Wheate, 1 W. Black. 123. Hale's P. C. 248, et seq. Trusts of inheritance, however, like uses before the statute, continued free from escheat upon attainder for petty treason or felony; and they are equally free from escheat for want of heirs.

Upon considering the principles on which the doctrine of escheat is founded, the reason is at once apparent, why trusts of inheritance do not come within its operation. It is simply this, that the attainder or death without heirs of the cestui que trust, does not create a vacancy in the tenure; because the cestui que use, or trustee, still remains tenant to the lord. The consequence, however, of either of the above disabilities on the part of the cestui que trust is, that the

* For note see next page but two.

In King and Holland, cited in Hard. 436, and *reported in Alleyne, 14, the case was, that Hol- [*309]

trust fails; not, indeed, in the way of escheat, but from the want of any person entitled to inherit the trust, or to sue out a subpoena to compel the performance of it. For as, from the moment of attainder, the person attainted is considered dead in the eye of the law, and his blood is corrupted so that he cannot transmit an inheritance to his descendants, it is clear that neither in that case, nor still more in the case of a natural dying without heirs, can there be any person entitled either as the living object of the trust, or as claiming by inheritance through him to demand the benefit of the trust.

Although a trust of inheritance is not liable to escheat, yet we have seen that in the case of high treason it becomes the subject of forfeiture. On the attainder of cestui que trust for high treason, the trust does not determine, as in the case of attainder for other felonies, but, by operation of the statute-law, becomes vested in the crown. It still remains as a trust, but the crown is substituted in lieu of the cestui que trust, and entitled to insist on the due execution of the trust for its own benefit.

The trust of a term is forfeited both for treason and felony, because a term is personal chattels, and the king is entitled by his prerogative to the goods and chattels of traitors and felons; but if a term be limited to attend the inheritance in trust, it will or will not be subject to forfeiture or escheat, according as the inheritance itself may or may not be so subject. Hardres, 466. Thurston v. Attorney-General, 1 Vern. 340. 1 Hale's P. C. 250. Sandys' case, Hardres, 488.

With respect to the estate of cestui que trust, after the passing of the Statute of Uses, it was liable to all the disabilities to which the estate of feoffees to uses was subject before that statute. Cestui que use might be a trustee only, and have no beneficial interest in the land; yet as long as he continued to hold the legal estate of inheritance the land was, in his hands, subject to all the consequences of a legal tenancy. It was subject to forfeiture if he was guilty of high treason; and on his attainder, or death without heirs, it escheated or reverted to the lord. In the mean time the cestui que trust was, by no crime or default of his own, deprived of his beneficial estate; for although the point had been disputed, the general understanding of late years seemed to be, that in such a case the king or lord would hold the land discharged of the trusts. Gilb. on Uses, Sugd. ed. 17, n. 10. See also Attorney-General v. the Duke of Leeds, 2 Mylne & Keen, 343. This great injustice was, in some degree, remedied as to the crown by the 40 Geo. 3, c. 88, and various subsequent acts, enabling the crown to direct the execution of any trusts affecting lands escheated or forfeited to his majesty; but it continued as to all cases of escheat and forfeiture to private lords. And when it is recollect that copyholds did not vest in the crown by escheat or forfeiture, but in such cases belonged to the lord of the manor, even as it seems in the instance of high treason (Lord Cornwallis's case, 2 Ventr. 38,) the remedy given by the above acts was very defective. The late statutes, however, of 11 Geo. 4 & 1 Will. 4, c. 60, and 4 & 5 Will. 4, c. 23, seem to have provided altogether against the injurious consequences of escheat, or forfeiture, by a trustee.

By the former of those statutes, entitled, "An Act for amending the Laws respecting Conveyances and Transfers of Estates and Funds vested in Trustees and Mortgagees, and for enabling Courts of Equity to give effect to their Decrees and Orders in certain cases;" the Court of Chancery is empowered, on the petition of the person beneficially entitled, to convey, assign, and transfer land, as well freehold as leasehold, and stock, the trustees whereof may be out of the jurisdiction, or it may be uncertain whether they may be alive, or who may be the heir, to such person, and in such manner as the said court shall think proper. And by the latter of those statutes, which is entitled, "An Act for the amendment of the Law relative to the Escheat and Forfeiture of Real and Personal Property holden in trust," it is enacted (sec. 2,) that when "any person seised of any land upon any trust or by way of mortgage, dies without an heir, it shall be lawful for the

land had purchased a copyhold estate in fee, in trust for an alien; and upon office found, the king seized, to have

Court of Chancery to appoint a person to convey such land in like manner as is provided by the act of the eleventh year of king Geo. 4, and the first year of his present majesty, intituled, 'An Act for amending the Laws respecting Conveyances and Transfers of Estates and Funds vested in Trustees and Mortgagors, and for enabling Courts of Equity to give effect to their Decrees and Orders in certain cases,' in case such trustee or mortgagee had left an heir, and it was not known who was such heir; and such conveyance shall be as effectual as if there was such heir." And it is further enacted (sec. 3), "That no land, chattels, or stock vested in any person upon any trust, or by way of mortgage, or any profits thereof, shall escheat or be forfeited to his majesty, his heirs, or successors, or to any corporation, lord of a manor, or other person, by reason of the attainer or conviction for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee, or survive to his co-trustee, or descend or vest in his representative, as if no such attainer or conviction had taken place." And after reciting (sec. 6,) that "it is expedient to relieve persons beneficially entitled to real or personal property, which has already escheated or become forfeited to his majesty, to corporations, to lords of manors, or others, by any of the means aforesaid;" it is therefore enacted, "That in all cases where, before the passing of this act, any person possessed of or entitled to any land, chattels, or stock, or any right to or interest in any land, chattels, or stock, as a trustee thereof, either in whole or in part, or jointly with some other trustee or trustees, shall have died without an heir, or shall have been convicted of any offence, whereby the said land, chattels, or stock, or any of them, have escheated or been forfeited, or have become subject to any escheat or forfeiture; then and in every such case the said land, chattels, or stock, or the right thereto or interest therein, which hath escheated or been forfeited, or become subject to escheat or forfeiture by reason thereof, shall be subject to the order, control and disposition of the Court of Chancery for the use of the party beneficially interested therein, in such manner and subject in all respect to such rights and incidents, and to such orders and regulations of the said court, under the provisions of the said act of the eleventh year of king George the Fourth, and of the first year of his present majesty, as if such person so dead without an heir, or so convicted as aforesaid, were out of the jurisdiction of or not amenable to the process of the said court without having been so convicted: provided always, that nothing in this clause contained shall extend to any land, chattels, or stock, now vested in any person by virtue of any grant thereof made subsequently to the time when such escheat or forfeiture first occurred; or to any land, chattels, or stock, which more than twenty years prior to the passing of this act shall have been actually vested in possession, or reduced into possession by the party entitled thereto by virtue of any such escheat or forfeiture."

According to the present law, therefore, it would seem, that neither by the death without heirs, nor by the attainer of the trustee, is the beneficial interest lost to the cestui que trust. If the trustee die without heirs, the Court of Chancery may, on the petition of the person beneficially interested, make such conveyance or assignment of the trust property as it may think fit to make for his benefit; and if the trustee be convicted and attainted, his attainer will not in future work a forfeiture of the trust property. The act of 4 & 5 Will. 4, c. 23, is even retrospective, and applies (with certain limitations) to cases where the trustee may have died without heirs, or been attainted previously to the passing of the act; and both the acts include real and personal property.

Besides escheat and forfeiture, however, there is the disability arising from the party being an alien; and this disability, which applies both to freehold and copyhold property, and generally speaking to leaseholds (See Co. Litt. 2, 6,) is not provided for either in the 1 Will. 4, c. 60, or the 4 & 5 Will. 4, c. 23.

If the alien be a trustee, and the lands which are subject to the trust be freehold, the crown will, doubtless, be entitled to take possession of them, and may, under the stat. 47 Geo. 3, stat. 2, c. 24, direct the execution of the trusts. So

the profits answered to him; and *per cur.* the trust was not forfeited, and an *amoveas manum* was granted.¹ The

with respect to those leaseholds which upon office found the king shall have. But there may be a question as to the right of the crown to seize where the trust estate is copyhold, for the king cannot hold of a private lord, nor do suit and service as a copyholder. 2 Siderf. 82. Co. Litt. 1, 6. Dyer. 2 b. pl. 8, in marg. It is apprehended, however, that the right of the crown extends to all lands held by an alien, whether of copyhold or any other tenure; and it is accordingly said in Calvin's case, 7 Co. 25, a, "that when an alien born purchaseth any lands, the king only shall have them, though they be holden of a subject; in such case the subject loseth his seignory." This might, no doubt, be a great hardship on the lord, by occasioning him the loss of his fines and other fruits of tenure, although the admittance of the tenant was made in ignorance of his being an alien; but there seems no reason why this injustice should not be remedied by the crown nominating some person to be admitted as legal tenant to the lord to pay the fines and perform the services due from the tenant, and to be answerable to the crown at the same time for the profits.

If the alien be *cestui que trust*, and the trust estate be freehold² there seems no doubt but that the trust is forfeited to the king. For several cases and observations on that point, and also on the case where the alien is *cestui que trust*, and the trust estate is copyhold, see note (1) below. With respect to leaseholds, it would seem that the king would be entitled to the trust declared for the benefit of an alien, in all those cases in which the crown would be entitled to seize if the legal estate were in the alien.]

² Burgess v. Wheate, 1 Wm. Black. 123. Sandy's case, Hard. 408.

¹ [There is reason to believe that the decision in King and Holland is not, in the place referred to, correctly cited by Hardres.

Hardres says (page 436), speaking of the King and Holland, "The case was, Holland had purchased a copyhold in fee in trust for an alien; and upon office found, the king seized to have profits answered to him. And *per cur.* it was not seizable; nor was the trust forfeited to the king. And an *amoveas manum* was granted. Trin. 23 Car."

In the Attorney-General v. Sir Geo. Sands, reported by Hardres, page 495, the case of King and Holland is cited, and Hale, Chief Baron, is made to say, "I hold that such a trust in an alien is forfeitable, and will belong to the king, as it was held in Tr. 23 Car. in Holland's case; and the reason is, because an alien has no capacity to purchase for the benefit of any other but of the king. And it would be otherwise inconvenient that aliens should receive the profits of land to their own use, and the mischief would be the same as if aliens purchased the land themselves; but in that case the king is entitled to the profits only; the land itself is not forfeited to him." It will be perceived that, according to Chief Baron Hale's statement (reported by Hardres himself) of the above case of King and Holland, the decision in it was, that the trust was forfeited to the king, a decision directly the reverse of Hardres' report.

So also it appears from the mention of the same case of King and Holland in 3 Rep. in Ch. 35, that the trust was held forfeited to the king. The case is thus cited; "An alien *cestui que trust* of an estate: the trust belongs to the king; and the Chief Baron said it was the opinion of the Judges in Holland's case, Trin. 23 Car. 1, where the Chief Baron was of counsel; for an alien hath no capacity to purchase but for the king's use."

In Alleyn, page 16, the King and Holland is thus mentioned. "And this term the Court took an exception to the commission, which was only to enquire what lands, etc., the alien had, but no *capias in manus* in it: and therefore it was resolved that the seizure was unduly made, and therefore they did not declare their opinion upon the matter in law." (The questions in law were, 1. If the king should have the trust. 2. If by virtue of that he might seize the land. 3. If the case differed because copyhold.) "But Bacon said, that an alien at the common law could not compel the feoffees to execute a use; and Roll said, that though the king should have the use, yet he could not seize the land itself by

[*310] reason for the *decision is stated to be, that the lord would otherwise be prejudiced by losing his services and fines.

law, but by equity he might have a decree for the land, and so was Sir John Dach's case." "And Hales said, that 19 Jac., in Sir John Dach's case in Scaccar., to whom the king granted a term to the use of the lord who was attainted for felony; upon great deliberation with all the Judges, it was resolved, and accordingly decreed, that the trust should be forfeited to the king, and the interest of Sir John also."

In 1 Roll. Ab. 194, which appears to cite the above case of the King and Holland, it is stated "to have been admitted that the trust should be given to the king, yet the king should not have the possession by force of the inquisition, but should sue to have the trust executed in the Court of Chancery." And Chief Baron Comyn in his Digest, tit. Alien, c. 2, says, "If an alien purchase a copyhold in the name of A., in trust for him and his heirs, the king shall have the trust." He cites 1 Roll. Ab. 194, but adds a *quære*.

Upon the whole, it seems clear that the report of the case of the King and Holland, in page 36 of Hardres, is incorrect, so far as relates to the decision that the trust was not forfeited to the king. On the contrary, it appears to have been considered on all hands to be forfeited. But the remedy which the king took in that case was wrong; for instead of suing in Chancery to obtain the benefit of the trust, he seized upon the land itself, which was in the possession, not of the alien, but of a trustee; and there was, moreover, the objection in that case, that the king could not hold the land as tenant of the manor, or do suit and service as a copyholder.

It is, perhaps, this latter circumstance which has occasioned a doubt existing to some extent in the profession, whether it is the king or the lord who is entitled to the benefit of a trust of copyholds declared for an alien. That the alien himself is not entitled to it seems to be admitted; but the other point is not considered so clear. It is impossible, however, to read the different cases on this subject without feeling that the whole course of reasoning is in favour of the king. Why does any disability exist on the part of an alien, but for reasons of state policy? And who shall take advantage of such disability, but the king, by reason of his prerogative? What interest has the lord of the manor in the subject that can interfere with the prerogative? The trustee is the tenant to the lord, and is answerable to him for his rents and services; and the tenancy being duly filled, the lord seems to have no further interest in the matter. It must be remembered, also, that the disability of an alien to hold land is not in the nature of a forfeiture, and that he may hold against every one but the king. 1 Beav. 92. The only reasonable ground on which the claim of the lord can be supported appears to be this; that the king, if entitled to the trust, is entitled to compel a surrender of the legal estate from the trustee, and in such case he would become tenant to the lord, which the king cannot be. The answer, however, to such an argument is, that the king is equally entitled to compel a surrender to a trustee for him, and that such a course would obviate all objections arising from the peculiar nature of the tenancy of copyholds.

It is proper to notice, that by the 47 Geo. 3, stat. 2, c. 24, after reciting the 39 & 40 Geo. 3, c. 88, which enabled the crown to direct the execution of any trusts to which lands being vested in the crown by escheat or forfeiture were theretofore subject, and that doubts had arisen whether the powers given by the said recited act extended to lands come to the crown by reason that the same had been purchased by or for the use of, or in trust for, any alien or aliens, it is enacted, "That in all cases in which his majesty, his heirs or successors, hath or shall in right of his crown or his Duchy of Lancaster, become entitled to any freehold or copyhold manors, messuages, lands, tenements, or hereditaments, either by escheat for want of heirs, or by reason of any forfeiture, or by reason that the same had been purchased by or for the use of, or in trust for, any alien or aliens, it shall be lawful for his majesty," &c., "to direct the execution of any trusts or purposes to which the same may have been directed to be applied," &c.

In the case of outlawry in personal *actions, [*311] the king is at law entitled to the rents and profits of *the offender's real estate, although he has [*312] no interest in the lands themselves;² and in King v. Holland, Style, 41, it is said, the king shall not have the profits of the land upon an outlawry *against [*313] the cestui que use, or cestui que trust. The reason of this seems to be, that at law the profits belong to the trustee, and the outlawry cannot affect him.

(3.) In the case of a direct trust, as where an estate is conveyed to the use of A. and his heirs, in trust for B. and his heirs, no time, as between the trustee and cestui que trust, can operate as a bar to the equitable rights of the latter;³ for between him and his trustee there is no adverse possession. If the trustee acquires the actual possession, it is still for the benefit of the cestui que trust. The converse of this rule will also hold: for the possession of the cestui que trust does not divest the legal estate from the trustee. A conveyance of the legal estate by the trustee, or, as Lord Hardwicke seems to have thought,⁴ a disseisin or actual ouster of the trustee by the cestui que trust, may indeed be presumed from length of possession, or under particular circumstances;

&c., and to make grants of such manors, &c., to any trustee or trustees, or otherwise for the execution of any such trusts or purposes, or to any person or persons for the purpose of restoring the same to the family of the person whose estates the same had been. The powers given to the crown by the above act have, at the present time, an additional importance, because the late act of the 4 & 5 Will. 4, c. 23, which enacts that lands vested in any trustee shall not escheat or be forfeited by reason of the attainder or conviction for any offence of such trustee, does not apply to cases where a trustee may happen to be an alien.

In the case of Duplessis and the Attorney-General, 1 Bro. Parl. C. 415, the Judges, on a question put to them by the House of Lords, decided that the legal disability of an alien to hold lands is not a penalty or forfeiture.

For the effect which subsequent letters of denization have on a previous purchase of an equitable interest in freehold lands by an alien, see *Fourdrin v. Gowdey*, 3 Mylne & Keen, 383. For the effect of a release by the crown, see *Eyston v. Symons*, Jur. 6th Vol. p. 817.

Where there is a trust to sell lands, and to divide the produce of the sale amongst certain persons, some of whom are aliens, the crown is not entitled to those shares of the produce which are payable to the aliens. *Du Hourmeline v. Sheldon*, 1 Beav. 79. 4 My. & Cr. 525, S. C.]

² *Vi. T. Jones*, 100. *Peyton v. Ayliffe*, 2 Vern. 312.

³ *Barn. 449. Townshend v. Townshend*, 1 Bro. C. C. 551. [Attorney-General v. Mayor of Exeter, Jacob. 448.]

⁴ *1 Ves. 435, 436*, in *Lord Portsmouth v. Lord Effingham*. See *ibid. 432*.

but time alone does not destroy the legal interest of the trustee.

As to a mere constructive trust,⁵ there is no doubt [*314] *that long acquiescence may bar the equitable claims of the cestui que trust;⁶ and it has often been determined, that a mortgagor may be deprived of his equity of redemption⁷ after a possession by the mortgagee for twenty years without any claim, or assertion of title, on the part of the mortgagor.⁸(a)

⁵ [See ante, p. 295, n. (2).]

⁶ See Beckford v. Wade, 17 Ves. 97, and the case of Bonny v. Ridgard there cited. Townshend v. Townshend, 1 Bro. C. C. 551. See also 17 Ves. 165. Chalmer v. Brady, 1 Jacob & W. 51. [2 Jacob & W. 177. 1 Ball & B. 166. 3 Yo. & Col. 622.]

⁷ [That is, if the mortgagee enters into possession solely under his mortgage title; in which case it appears that time will continue to run against the mortgagor and all those claiming under him, whatever may be the disabilities to which they may be subjected. But if the mortgagee enters not in his character of mortgagee only, but as purchaser of the equity of redemption, and the conveyance gives for his benefit the estate only of a tenant for life, he must discharge the duties belonging to an estate for life, one of which is to keep down the interest of the mortgage for the benefit of the persons entitled in remainder; and time will not run against the remainder-man during the continuance of his life estate. Raffety v. King, 1 Keen, 601.]

⁸ 17 Ves. 99. Anon. 2 Atk. 333. Aggas v. Pickerell, 3 Atk. 225. See Lake v. Thomas, 3 Ves. 17. See Hodle v. Healey, 1 Ves. & B. 536. Whiting v. White, Cooper, 1. Reeks v. Postlethwaite, Cooper, 161. Baron v. Martin, Cooper 189.

[By the act 3 & 4 Will. 4, c. 27, entitled "An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for Trying the Rights thereto," it is enacted (s. 28), "That when a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent, comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing signed by the mortgagee or the person claiming through him; and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given." And subsequently, by an act passed in the first year of her present majesty Queen Victoria (c. 28), entitled "An Act to amend an Act of the Third and Fourth Years of His late Majesty, for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto," reciting that doubts had been entertained as to the effect of a certain act of parliament made in the third and fourth years of his late majesty King William the Fourth, entitled "An Act for the Limitation, &c." so far as the same related to mortgages; and that it was expedient that such doubts should be removed, it was enacted, that it should and might be lawful for any person entitled to or claiming under any mortgage of land, being

(a) An action to enforce a resulting trust cannot be maintained after twenty-one years. Neill v. Keese, 5 Texas, 23. See Pinkston v. Brewster, 14 Ala. 315; Shible v. Ely, 2 Halst. Ch. (N. Jersey,) 181.

In the case of Fenwick *v.* Reed, 1 Mer. *114, [*315] 124, 125, Lord Eldon has observed, that it is clearly settled that length of time in the case of the *virum vadum*, or Welch mortgage, would be no bar to redemption, unless it were proved that the party had held over for the space of twenty years after the debt was fully paid; and that length of time, under such circumstances, might be set up^{*} as a bar in the case [*316] of a Welch mortgage, as in the case of an ordinary mortgage.

(4.) A fine levied by a trustee cannot prejudice the equitable interest of his *cestui que* trust, unless it be levied to a purchaser without notice;¹ and as *cestui que* trust, entitled to the equitable inheritance, is considered at law merely as tenant at will to his trustee, a fine levied by him will not divest or prejudice the legal estate.¹

But where a term of years is assigned to a trustee to attend the inheritance, and the owner of the inheritance conveys by fine to a purchaser without notice of the term, it is said, that the non-claim upon the fine will bar the legal interest in the term.² It is clear, however, that when the fine is levied to the use of the conuzor, or indeed to a purchaser, who takes an assignment of the outstanding term to a trustee named by himself, or where the term is antecedently charged by way of security with payment of a sum of money, the legal estate vested in the trustee would not be affected by the fine.³

(5.) Although the trust of a term of years in gross^{*} cannot be so limited as to make it descendible [*317] as real estate, yet when the *cestui que trust* of the term is also the beneficial owner of the immediate inhe-

land within the definition contained in the first section of the said act, to make an entry or bring an action at law or suit in equity to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years might have elapsed since the time at which the right to make such entry, or bring such action or suit in equity, should have first accrued, any thing in the said act notwithstanding.]

^{*} See Gilb. Ch. 62.

¹ See Earl of Pomfret *v.* Lord Windsor, 2 Ves. 472, 481.

² Ischam *v.* Morris, as cited 2 Vent. 329. 3 Bac. Ab. 448.

³ The reader will find all the cases upon these points collected in Bac. Ab. tit. "Leases and Terms for Years," (Q.) vol. iii. 448.

ritance in fee-simple, the term becomes consolidated with, or attendant upon, the inheritance. If the legal interest in a term of years becomes vested in the person legally entitled to the immediate reversionary freehold, the term becomes merged at law by the union: and by an analogy to this rule, the Court of Chancery has determined, that where the owner of the legal estate of inheritance is entitled to the equitable interest in a term of years, of which the legal estate is vested in a trustee, and the term of years, if legally vested in the owner, and not in his trustee, would at law have become merged, the equitable interest in the term will become consolidated with the inheritance, and will follow the limitations of it;⁴ or, to use the expression of Sir Matthew Hale,⁵ the equitable interest in the term "is no more than a shadow, an accessory" to the inheritance. It will belong to the heir or devisee;⁶ it will be real assets;⁷ it will, as against the heir⁸ or assignees of a bankrupt,⁹ be subject to dower, and for the same reason to curtesy; it will not be forfeited [*_318] for the felony of *cestui que *trust*,¹ and it will not pass by a will, not attested by three witnesses.²

A term may become attendant upon the inheritance, without any express declaration for that purpose, either where the legal interest in the term is vested in the trustee, and the legal freehold in the owner of the inheritance, or where the owner is beneficially or equitably entitled to the inheritance, and is legally possessed of the term, or where the legal estate, both of the term and the inheritance, is vested in trustees.³

⁴ *Best v. Stamford*, Prec. Cha. 252. ² *Freem.* 288, S. C.

⁵ *Hard.* 494.

⁶ *3 Cha. Rep.* 37.

⁷ *Ante*, 290.

⁸ *Wray v. Williams*, Prec. Cha. 151. ^{1 P. W.} 137.

⁹ *Vin.* 227, pl. 60, *Squire v. Compton*.

¹ *Attorney-General v. Sandys*, Hard, 488. ^{3 Cha. Rep.} 33. [And it is liable, it seems, to be seized under an execution against the *cestui que trust*, the owner of the inheritance. *Doe v. Evans*, 1 Cro. & Mee. 450.]

² *Whitchurch v. Whitchurch*, 2 P. W. 238. [By the late act, 1 Vict. c. 26, entitled "An Act for the Amendment of the Laws with respect to Wills," two witnesses are sufficient (and at the same time are necessary), to pass every species of property.]

³ See *Cooke v. Cooke*, 2 Atk. 67, and notes to the last edition. *Collect. Jur.* 273. [And it appears that an attendant term will follow the inheritance, though the inheritance be tortiously obtained. "Where there is a term to attend the inheritance, and the right to the inheritance is lost by fine and non-claim, equity must follow the law, and cannot consider him who has lost the inheri-

But although a term may become attendant upon the inheritance, the beneficial owner may destroy the equitable union.⁴ "A trust of a term *that follows [*319] the inheritance, may be resembled to a box of charters, which shall go to the heir with the lands; but if the owner grant them over, then they shall go to the executors of the grantee."⁵

I have already stated, that when the equitable interest in the term is vested in the person who is entitled to the immediate reversion in fee-simple, it is not necessary that there should be an express declaration to make the term attendant upon the inheritance.⁶ The consolidation of the equitable interests arises from a rule of equity adopted for the protection of real property. It is difficult therefore to understand the ground upon which the case of *Scott v. Fenhouillet*⁷ is said to have been determined. In that case there appears to have been a legal interest of a few days dividing the term of years upon which the question arose, from the inheritance; so that if the legal interests of that term and of the inheritance had been united in one person, there would not have been a merger at law, on account of the intervening term; and Lord Thurlow is reported to have said, that whether the term would or would not merge, an express declaration would make it attendant. Now if, in that case, the owner of the inheritance was entitled to the *beneficial* interest in the *intervening, as [*320] well as in the other term, then he had a right to direct an assignment of both; and consequently as he might, in that case, have caused the merger of them at law, the equitable interests must, according to the rule just noticed, have become attendant upon the inheritance, without the necessity of an express declaration. But if the beneficial, as well as the legal interest, in the intervening term was outstanding in a third person, I

tance as entitled in equity to claim the term which is to attend it." And it makes no difference that the person who has acquired the tortious inheritance is himself trustee of the term. *Reynolds v. Jones*, 2 Sim. & Sta. 206.]

⁴ *Hayter v. Rod*, 1 P. W. 376. 1 Term Rep. 770.

⁵ *Hard. 496.*

⁶ See *Tiffin v. Tiffin*, 1 Vern. 1. *Dowse v. Derivall*, ibid. 104. *Goodright v. Sales*, 2 Wils. 329.

⁷ 1 Bro. Cha. Ca. 69. [See *Capel v. Girdler*, 9 Ves. 509.]

am not aware of any rule of construction upon which it can be admitted that the express declaration of the parties could make the term attendant. Mr. Fearne,⁸ in considering this case of *Scott v. Fenhouillet*, expressly states it to be his opinion, that, if there had been such intervening term, the declaration of the trust of the term to attend could not have made it so; and his opinion was, no doubt, grounded upon the principles which I have already stated, that the trust of a term being governed by the same rules as the limitation of the term itself at law,⁹ the parties cannot make it descendible as real property to the heir, except in the particular case where, by analogy to the doctrine of merger at law, the courts of equity consolidate the equitable interest of the term with the inheritance. The author of the *Treatise of Equity* has properly observed (vol. ii. 106), "That a term attendant becomes in *gross*, when it is divided from the inheritance by *different limitations*.
[*321] The trusts of *a term in gross, therefore, can be limited no otherwise in equity than the estate of a term in gross can be devised in law; for they are not for setting a rule of property in Chancery, other than that which is the rule of property at law."

It is probable, therefore, from the confused statement of the case of *Scott v. Fenhouillet* in Brown, that Lord Thurlow's words are not correctly reported; for, considering them as an authority, the doctrine, subversive of former principles, would be practically important in its application. Cases may be suggested: for instance, suppose an estate subject to a beneficial lease is settled upon A. for life, with remainder to his first and other sons successively in tail, with remainders over, with remainder to B. in fee: and that B. having this remote reversion, purchases or acquires the prior lease, or term of years; if B., by any declaration can make this term, or lease, attendant upon his reversionary inheritance, he may consequently convert it in equity into real, instead of personal, assets. This is indeed an extreme case; but in principle there can be no difference, whether the

⁸ 2 Col. Jur. No. 5.

⁹ See 1 Vern. 164.

inheritance is divided from the term by an intervening interest of ten days, or of any greater term or estate. If there is any difference in the extent of the intervening estate, what is the measure of it? Where is the boundary to be fixed?

It remains to be observed, that although a [*322] *term be attendant in equity upon the inheritance, it is at law always considered as a term in gross; and therefore a person purchasing the inheritance, and taking an assignment of a satisfied term in the name of a trustee, will, by means of the term, protect himself against intervening incumbrances, of which he has no notice,¹ and against the dower of the vendor's wife, notwithstanding he has notice of it.² But in these cases it is necessary that the purchaser should acquire the actual assignment of the term to his trustee.³

(6.) Notwithstanding the words of limitation of a trust in fee-simple, or fee-tail, correspond with the construction of limitations of a legal estate, money may, in a court of equity, be impressed with the nature of real estate, and lands of inheritance may be converted into the nature of personal estate.

In the case of *Fletcher v. Ashburner*,⁴ Sir Thomas Sewell observed, "That nothing was *better esta- [*323] blished than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given; whether by will, by way of contract, marriage-articles, settlement, or otherwise; and whether the money is actually deposited, or only covenanted to be paid, whether the land is actually conveyed, or only agreed to be conveyed. The owner of the fund, or the

¹ See *Willoughby v. Willoughby*, 1 Term Rep. 763. *Goodtitle v. Jones*, 7 Term Rep. 47. And though he purchased in the inheritance after he had notice of the second mortgage. *Marsh v. Lee*, 2 Vent. 339. But in the case of the *King v. Smith*, the judgment of which is reported in *Sugden, Vend. & Pur.*, [vol. ii. 236, app. 36, 10th ed.] a purchaser was not allowed to avail himself of the protection of a term against a debt due to the crown.

² *Wynn v. Williams*, 5 Ves. 130, 134. [*Mole v. Smith*, Jac. 490.]

³ *Maundrell v. Maundrell*, 7 Ves. 567. 10 Ves. 246.

⁴ 1 Bro. C. C. 497.

contracting parties, may make land money, or money land. The cases established this rule universally."

In the case of *Walker v. Denne*,⁵ Lord Rosslyn thought that there was no equity between the real and personal representatives upon the converted fund; but he thought that the property was to be taken by the representatives in the state in which it happened to be at the death of the party. But this doctrine is clearly erroneous. In *Wheldale v. Partridge*,⁶ Lord Eldon said, "I am also disposed to say, notwithstanding the opinion of Lord Rosslyn in *Walker v. Denne*, and some other modern authorities, that if this instrument is to be taken to impress this fund with real qualities immediately upon the execution, in the question between the heir and executor, the money being once clearly and plainly impressed [*324] with *real uses as land, and one of those uses being for the benefit of the heir, the impression will remain for his benefit; and to put an end to that impression, it must be shown either that the money was in possession of a person who had in himself both the heirs and executors, or he must do some act to denote a change of his intention as to the devolution of the property upon either; and it is not correct to say the Court does not interpose between volunteers, if they give to the executor that money which the instrument has given to the heir." Several modern cases have established Lord Eldon's opinion.⁷

Money agreed or directed to be laid out in land, is, for all the purposes for which it is so agreed or directed to be laid out, considered as real estate; it will descend to the heir;⁸ it will be real assets to pay debts;⁹ it will be

⁵ 2 Ves. jun. 170, 176.

⁶ 8 Ves. 235. 5 Ves. 388, S. C.

⁷ See *Thornton v. Hawley*, 10 Ves. 129. *Biddulph v. Biddulph*, 12 Ves. 160. *Kirkman v. Miles*, 13 Ves. 338. *Shard v. Shard*, 14 Ves. 348. [*Ashby v. Palmer*, 1 Mer. 296.]

⁸ *Edwards v. Countess of Warwick*, 2 P. W. 171. *Lechmere v. Carlisle*, 3 P. W. 211. *Cross v. Addenbrooke*, and *Fulham v. Jones*, 3 P. W. 221, note C. [2 Russ. & My. 493. Money, subject to be invested in the purchase of lands to be settled so that any person, if the lands were purchased, would have an estate tail therein is, for the purposes of the act for the abolition of fines and recoveries (3 & 4 Will. 4, c. 74), to be treated as the lands to be purchased. See sec. 71 of that act. 3 My. & Ke. 249.]

⁹ *Trelawney v. Booth*, 2 Atk. 307. *Whitwick v. Jermin*, cited in *Baden v. Pembroke*, 2 Vern. 58. [And see *Frederick v. Aynscombe*, 1 Atk. 392.]

subject to *curtesy,¹ and it will pass by a devise [*325] of lands or hereditaments.²

So real estate under an absolute trust or direction to sell, is for all purposes considered as personal estate,³ and therefore where an heir at law becomes entitled by way of resulting trust to a partial interest, under, or in consequence of, a conveyance or devise in trust to sell, the interest so resulting to him will be part of his personal estate.⁴

*The fund which is to be converted will continue to have the equitable quality which it is ultimately to possess, until the conversion takes place, or until some person becoming absolutely entitled to the beneficial interest, elects to take it in the shape in which it then is. It frequently becomes a question, what act shall amount to an election;⁵ although very slight evidence of intention will be sufficient. In *Brandish v. Gee*,⁶ Lord Hardwicke said, that he could not admit that a parol declaration would amount to an election. When a person entitled to the fee-simple of an estate to be purchased with trust money, and without requiring the purchase to be completed, causes the securities for the money to be changed in the name of a trustee, in

¹ *Sweetapple v. Bindon*, 2 Vern. 536. *Cunningham v. Moody*, 1 Ves. 176. [And, as it is apprehended, since the late statute, 3 & 4 Will. 4, c. 105, to dower also.]

² *Lingen v. Sowray*, 1 P. W. 172. *Harvey v. Aston*, 1 Atk. 364. *Green v. Smith*, ib. 572, and note. *Beauclerk v. Mead*, 2 Atk. 189. *Guidot v. Guidot*, 3 Atk. 253. *Rashley v. Masters*, 3 Bro. Ch. Rep. 99. *Whitaker v. Whitaker*, 4 Bro. Ch. Rep. 31. [And it could not be devised by an infant, although of sufficient age to bequeath personal estate. *Earlom v. Saunders*, Ambler. 241. (The new act relating to wills, 1 Vict. c. 26, has abolished the distinction between the ages at which real and personal estate can be disposed of by will.)]

³ The case of a conveyance by commissioners to the assignees of a bankrupt, in trust to sell, is not within the rule. *Bromley v. Gooden*, 1 Atk. 75, 80: nor a sale under the decree of the court of a mortgaged estate belonging to an infant. *Mondey v. Mondey*, 1 Ves. & B. 223. [And see *Stead v. Newdigate*, 2 Mer. 521. *Biggs v. Andrews*, 5 Sim. 424. *Ashby v. Palmer*, 1 Mer. 296.]

⁴ *Hewit v. Wright*, 1 Bro. C. O. 86. *Wright v. Wright*, 16 Ves. 188. [Smith v. Claxton, 4 Mad. 484. *Amphlett v. Parke*, 2 Russ. & My. 221. Where, however, there is only a contract to sell, the creditor of the person contracting to sell cannot insist upon a conversion into personal assets, unless the title be such that the court will compel a purchaser to take it. *Johnson v. Legard, Turn. & Russ.* 281. Real estate purchased out of partnership property, and used for partnership purposes, is considered converted into personalty. *Selkirk v. Davies*, 2 Dow. 230; *Houghton v. Houghton*, 11 Sim. 491, and the cases there cited.]

⁵ See *Stead v. Newdigate*, 2 Mer. 521. [*Biggs v. Andrews*, 5 Sim. 424.]

⁶ *Amb.* 229.

trust for himself, *his executors and administrators*,⁷ and where a person entitled absolutely to the money to arise by the sale of real estate, makes a lease of the estate itself, reserving rent payable to him, *his heirs and assigns*:⁸ these circumstances have been considered to amount to an election.

A feme covert having an absolute power of appointment over her separate property, is in respect of such [*327] property in the situation of a *feme sole, and is consequently capable of making an election. But where a feme covert is entitled to real estate to be purchased with trust money, not subject to her appointment, she cannot, by a mere act of election, alter the nature of the fund: she must either cause the money to be invested in land for the purpose of levying a fine of it, or she must appear personally in the Court of Chancery for the purpose of consenting to take the money as personal estate: the latter mode being considered in equity as equivalent to a fine.⁹

Connected with this subject, it may not be improper to observe, that where an estate is conveyed or devised to trustees in trust to sell, and to lay out the moneys to arise by the sale in the purchase of other lands to be settled upon A. in tail, with remainder to him in fee; A., previously to the sale of the original estate, may, by levying a fine of it, acquire the absolute beneficial interest in it in fee-simple, and thereby elect to take the [*328] *estates directed to be sold, in lieu of that directed to be purchased.¹

⁷ *Lingen v. Sowray*, 1 P. W. 172.

⁸ *Crabtree v. Bramble*, 3 Atk. 680.

⁹ *Oldham v. Hughes*, 2 Atk. 452. [By 3 & 4 Will. 4, c. 74, (the act for the abolition of fines and recoveries,) a married woman may in every case (except that of being tenant in tail, for which other provision is made by the act,) dispose of lands and money subject to be invested in the purchase of lands, by deed in which her husband concurs, and acknowledged by her as therein directed. Where, previously to this act, a married woman entitled to a share of the proceeds of real estates directed to be sold, joined with her husband in assuring and levying a fine of her share to a mortgagee, it was held that she was barred of her equity to a settlement (*May v. Roper*, 4 Sim. 360): and an acknowledgment is now equivalent in this respect to a fine before the statute. *Forbes v. Adams*, 9 Sim. 462.]

¹ *Pearson v. Lane*, 17 Ves. 101. *Bullock v. Fladgate*, 1 Ves. & B. 471. [Now under the act for the abolition of fines and recoveries, s. 71, land so conveyed or devised, would, for the purpose of disposition, be treated as the land to be purchased, and be considered subject to the same estates as the lands to be purchased would, if purchased, have been actually subject to.]

Neither an infant³ nor a trustee⁴ can elect to alter the nature of the fund.

When an estate is conveyed, or devised, to trustees in trust to sell, and to pay the moneys to arise by the sale among several persons, it is necessary that all the *cestuis que trust* should concur in electing to take the original property as real estate; for none of the *cestuis que trust* can, against or without the consent of any one of them, prevent the sale of the estate. This is a point of great importance in the consideration of titles; and as there is not much to be found in the books upon it, I have thought it necessary to add the following extracts of the opinions of Sir Thomas Sewell and Lord Hardwicke.

In *Fletcher v. Ashburner*,⁵ Sir Thomas Sewell observes, that "where an estate is directed to be sold, and the money divided among several *persons, none [*329] has a right to say that any part shall not be sold."

In *Crabtree v. Bramble*,⁶ Lord Hardwicke says that "no election could determine the question as to those claiming under the trust; but as to those only who claim as volunteers:" and in *Bradish v. Gee*,⁷ there is the following passage: "In the present case, one tenant in common had consented to a decree for sale of the whole estate, and his lordship said he was bound by it; for the other parties were interested in that consent, because their shares of the estates would not sell so well separate as if the whole was sold together; and his lordship said, even if he had afterwards petitioned that the land should not be sold, yet the decree would not be varied, and the money arising by the sale would go to his personal representative."

It should seem to follow from these principles, that if A. devises a real estate in trust to be sold, and directs that the money which shall arise by the sale shall be invested in the purchase of another estate to be conveyed to B. in fee-simple; and if before the sale B. dies, having bequeathed the moneys to arise by the sale to C., and

³ *Carr v. Elliston*, 2 Bro. C. C. 56.

⁴ *Earlom v. Saunders*, Amb. 241. There can be no presumption to take as real estate, where there is incapacity. *Ashby v. Palmer*, 1 Mer. 296.

⁵ 1 Bro. C. C. 497.

⁶ 3 Atk. 680.

⁷ Amb. 229.

having appointed D. his executor, C. cannot by electing to take the devised property as real estate, prevent a sale [*330] of it against D., who, as executor, may *require the money for payment of the testator's debts.

(7.) When a lesser and a greater estate are united in the same person without any intervening interest in another, the lesser estate is, generally speaking, merged at the common law: and the extinguishment is effected by the mere union of the estates without the aid of intention, and even against it. But in equity the concurrence of beneficial interests in the same person, does not alone consolidate them; and in some cases the courts of equity will relieve against the effects of a legal merger.⁷

A person having an equitable lien upon an estate for the payment of a sum of money, and afterwards becoming entitled to the estate itself either for life, or in tail,⁸ is not, by the mere accession of the estate for life, or in tail, deprived of the benefit of his lien; for he has a partial interest in the estate, and an absolute right to the money; and there is no ground in equity to exonerate the estate from the lien in favour of the persons in remainder, or of the issue in tail, to the prejudice of the personal representatives of the tenant for life or in tail.⁹

*But where a person is absolutely entitled to a [*331] sum of money charged upon an estate, and afterwards becomes entitled to the fee-simple of the estate, the Court of Chancery, in most cases, consolidates the rights by extinguishing the equitable lien. The rule, however, has two exceptions; the first, in favour of creditors;¹ and the second, in favour of infancy, where the person, becoming entitled to the charge and the estate, dies during his minority, having by will disposed of the charge.²

⁷ See *Danby v. Danby*, Finch. 220, *Sanders v. Bournford*, *Ibid.* 424.

⁸ *Duke of Chandos v. Talbot*, 2 P. W. 604. 15 Vin. 369, pl. 4.

⁹ [So also where a person was entitled to the estate for his life, with remainder to his first and other sons in tail, with remainder to his right heirs, and he died without issue; it was held, that the charge was not merged. *Wyndham v. Earl of Egremont*, Ambler, 753, Blunt's ed.]

¹ See 2 Vern. 208, *Compton v. Oxenden*, 2 Ves. jun. 261.

² *Chester v. Willis*, Amb. 246. *Powell v. Morgan*, 2 Vern. 90. *Thomas v. Keymiss*, 2 Vern. 348. See also the case, where a mortgagee acquires the equity of redemption, *Forbes v. Moffat*, 18 Ves. 384, *Toulmin v. Steere*, 3 Merl. 210. [See also *Smith v. Frederick*, 1 Russ. 195; *Parry v. Wright*, 5 Russ. 142; *Brown*

*These points are well explained by Lord Northington in *Donisthorpe and Wife v. Porter*.³ In [*332] that case Richard Porter settled estates to the use of himself for life, remainder to his wife for life, remainder to trustees for 100 years for raising 1,000*l.* for portions of daughters and younger sons, with remainder to himself in fee.

Richard Porter died, leaving one son, and a daughter. The wife of Richard Porter also died; then the daughter died intestate, leaving Richard (who was entitled to the estate in fee-simple,) her only brother, and next of kin. Richard the son died intestate, leaving Robert Porter, his heir-at-law, and Catherine, wife of Donisthorpe (the plaintiff,) his next of kin.

Donisthorpe and wife filed their bill against Robert Porter to have the 1,000*l.* raised, and Lord Northington, chancellor, said, "The question, whether the 1,000*l.* ought to be raised, is a question of consequence. I do not find that the counsel has cited a decision in point, yet, on grounds of general practice, I am perhaps better satisfied than I should be, if I depended on authorities. It is a case of consequence, because it may frequently happen in families. It might, if determined for the plaintiffs, revive dormant claims in families. *I think cases of consolidating rights in equity are [*333] reducible to a solid foundation. I do not think it a rule, that a charge upon an estate, which can only be got at by trustees, and so not merge at law, shall be distinct in equity, and go to the administrator, whilst the estate goes to the heir. But I think, where the owner has an absolute interest in the estate and charge, the charge is

v. Stead, 5 Sim. 535; *Smith v. Phillips*, 1 Keen. 694; *Farrow v. Rees*, 4 Beav. 20.

An infant cannot now make a will even of personalty (7 Will. 4, and 1 Vic. c. 26, s. 27;) and, therefore, the second exception mentioned in the text has ceased to exist. In the case of *Hood v. Phillips*, 3 Beav. 517, it is stated to be an admitted general rule, that if the same person becomes absolutely entitled to an estate, and to a sum of money which is charged upon it, the court will deem the charge to have become merged in the estate, or to have become extinguished; unless it shall appear that the owner of the estate and of the charge intended otherwise; and it is added, that for the purpose of showing the intention, evidence, direct and presumptive, may be resorted to. In that case, a transfer of the charge to a trustee for the owner of the estate was held to be one of the grounds for rebutting the presumption of merger, but was not considered as amounting in itself to decisive evidence against the presumption.] ³ Amb. 600.[2 Eden, 16 3.]

annihilated for the benefit of the estate and heir. The court does not consider the subtleties of mergers, but discharges the estate from the incumbrance ; it would otherwise burthen estates to no purpose. But there are two exceptions : 1st, the case of creditors arising from the power and justice of this court, correcting the illiberality of law with regard to creditors ; viz., that a man may die insolvent, leaving a very good estate ;—2dly, of infants.⁴ As to mergers, courts of law cannot look into rights or beneficial interests. It merges estates lying in the same person, but cannot where they lie in different persons. Equity does not regard that, but looks into the beneficial interests and views of the parties, whether the estates are strictly in the same person, or in different persons.” The bill was therefore dismissed.

[*334] *Even in the case of infancy, it seems necessary, in order to keep the charge on foot, that the infant should manifest an intention that the charge should not merge⁵ and upon this principle there is no equity in favour of the personal representatives of a lunatic against the heir, to have a charge of this kind raised.⁶

When a man marries an infant, entitled to the fee-simple of an estate, and to a sum of money charged upon it, and which becomes an interest vested in the infant upon the event of the marriage, it should seem that the charge would not merge to the prejudice of the husband.

Upon a case where two daughters were presumptively entitled to a sum of money, raisable under the trusts of a term of years, and which was to become vested in them at the age of twenty-one, or marriage, and the fee-simple descended upon them before the portions became vested, and afterwards one of the daughters married under twenty-one, and the other married, having attained

⁴ In the case of *Lord Compton v. Oxenden*, 2 Ves. jun. 261, the chancellor said, the cases of infants turn upon a *supposed intent* : and that the court saw in *Thomas v. Keymiss*, that it was much more beneficial to the *infant* that it should continue *personal* : because the infant has the use and disposition of that before twenty-one ; but he could have no disposable interest in real till that age. See also 18 Ves. 392, 393. [See *ante*, p. 331, n. 2.]

⁵ See *Powell v. Morgan*, and *Thomas v. Keymiss*, *supra*, and *Chester v. Willis*, Amb. 246.

⁶ *Compton v. Oxenden*, *supra*.

that age, the late Mr. Fearne⁷ thought "that after the descent, each daughter might be considered as entitled to one moiety of the lands, and to a charge of one moiety of her portion out of the other moiety of the lands; and although *as such charges were equal and reciprocal, they may be said to have countervailed and [*335] discharged each other, yet, considering that such a conclusion would be in prejudice to the rights of third persons, viz., their husbands, who would have been entitled to such portions, it was not to be relied on."

But Mr. Fearne's opinion as to the charge of each daughter upon the other's moiety is not tenable; for in the arrangement of equitable rights, it is a principle of the Court of Chancery to avoid circuity. In fact, the point had previously received a determination in the case of *Stephen v. Lord Bateman*.⁸

V. There is a distinction between a trust executed, and a trust executory.⁹(a) When an estate *is [*336] conveyed to the use of A. and his heirs, with a

⁷ Opinion dated 1784.

⁸ 1 Bro. Cha. Ca. 22. It must be observed, that if Mrs. Stephens, in this case, had a charge upon her sister's moiety, for a moiety of her (Mrs. Stephens') portion, then the settlement by Mr. and Mrs. Stephens, of her moiety of the estate, would have been no extinguishment of that moiety of her portion, which was charged upon her sister's moiety of the estate. [See *Church v. Edwards*, 2 Bro. C. C. 180, and the observations on that case in *Preston's Conv.* vol. iii. p. 90. *Smith v. Frederick*, 1 Russell, 174.]

⁹ [The alleged distinction between trusts executed and executory has been either disputed, or considered incorrect in point of expression in some of the older cases; and much difference of opinion formerly existed on the subject. See *Bagsaw v. Spencer*, 1 Ves. jun. 142, and 2 Atk. 577; *Austen v. Taylor*, 1 Eden, 361, and *Ambl.* 376, *Blunt's ed.*; *Stanley v. Lennard*, 1 Eden, 95; *Lord Glenorchy v. Bosville*, Ca. Temp. Talbot, 3; *Roberts v. Dixwell*, 1 Atk. 607; *Bastard v. Proby*, 2 Cox. 6; *Fearne's Contingent Remainders*, 178 to 205.]

In *Jervoise v. the Duke of Northumberland*, 1 Jac. & Walk. 570, Lord Eldon, alluding to this subject, says, "I repeat, where there is a trust executory, because one is a good deal confused by the inaccuracy of the expressions, trust executory and executed. The latter, no doubt, in one sense of the word, is a trust executory; that is, if A. B. is a trustee for C. D. or for C. D. and others, that, in this sense, is executory, that C. D. or C. D. and the other persons may call upon A. B. to make a conveyance and execute the trust; but these are cases where the testator has clearly decided what the trust is to be; and as equity follows the law, where the testator has left nothing to be done, but has himself expressed it, there the effect must be the same whether the estate is equitable or legal."

(a) Defined in *Boswell v. Dillon*, 1 Drury, 291; *Dennison v. Goehring*, 7 Barr, (Penns.) 177; *Posey v. Cook*, 1 Hill, (S. Car.) 413; *Merrill v. Brown*, 12 Pick, (Mass.) 216; *Schley v. Lyon*, 6 Georgia, 530.

See *Laurens v. Jenney*, 1 Spears, (So. Car.) 356; *Baker v. Biddle*, 1 Bald. (Penns.) 394; *Upham v. Varney*, 15 N. Hamp. 462.

simple declaration of the trust for B. and his heirs, or the heirs of his body, the trust is perfect; and it is said to be executed, because no further act is necessary to be done by the trustee to raise and give effect to it; and, because there is no ground for the interference of a court [*337] of *equity to affix a meaning to the words declaratory of the trust, which they do not legally import.

But in the case of articles of agreement, made in contemplation of marriage, and which are consequently preparatory to a settlement, and in the case of those wills which are merely directory of a subsequent conveyance, the trusts declared by them are said to be executory, because they require an ulterior act to raise and perfect them. They are rather considered as instructions for settlements, than as instruments in themselves complete; and the Court of Chancery, in order to promote the presumed views of the parties in the one case, and to support the manifest intention of the testator in the other, will attach to the words expressive of the trusts a more liberal and enlarged construction than they would admit, if applied either to the limitation of a legal estate, or a trust executed.

It has before been observed, that words of limitation, applicable to trusts executed, correspond with the limitations of legal estates. But in a marriage agreement, directory of a settlement, the words "heirs of the body" will be considered as words of purchase, and will authorise a limitation in strict settlement to the first and other sons successively in tail; for it would be inconsistent with the nature of the transaction, and would defeat the

In *Stanley v. Lennard*, 1 Eden, 95, Lord Keeper Henley observes, "The distinction between trusts executed and executory seems to be ill expressed; but, where properly taken, appears to have good sense in it. In all cases of the latter description, something is left to the judgment of the trustees, and consequently of the court, which has to perform the office of counsel."

At present the distinction between a trust executed and a trust executory seems fully established. *Countess of Lincoln v. Duke of Newcastle*, 12 Ves. 227. *Jervoise v. Duke of Northumberland*, 1 Jac. & Walk. 574. *Blackburn v. Stables*, 2 Ves. & Bea. 369. *Lord Deerhurst v. Duke of St. Albans*, 5 Madd. 260. 2 Cl. & Fin. 611, S. C. (reported under the name of *Tollemache v. Coventry*). *Duke of Bedford v. the Marquess of Abercorn*, 1 My. & Cr. 312. *Davies v. Davies*, 4 Beav. 54. *Douglas v. Congreve*, 1 Beav. 59; 4 Bing. N. C. 1; 5 Bing. N. C. 318, S. C. *Banks v. Le Despencer*, 10 Sim. 576, 11 Sim. 508, S. C., and the cases there cited.]

objects of the 'articles, if, by construing those words as words of limitation, an *estate tail were limited to the husband which he might immediately afterwards defeat.¹

In wills, raising executory trusts, words of limitation, as "heirs of the body," will be converted into words of purchase, if the testator has, by some expression, manifested an intention that they should not be construed in the former sense; as where a testator having, by will, directed an estate to be settled upon A. and the heirs of his body, explains the extent of the gift to A. by declaring, that he shall be tenant for life without impeachment of waste;² or, that there shall be *trustees to preserve contingent remainders;³ or, that the heirs of the body shall take "in succession and priority;"⁴ or, "as counsel shall advise;"⁵ or, that the settlement upon A. shall be made "at the discretion of the trustees;"⁶ or, that the settlement shall be so made, that A. shall not be empowered "to dock the entail;"⁷ or, that the settlement shall be made upon A. (being a feme covert) "for her separate use" for life.⁸

¹ See *Jones v. Langton*, 1 Eq. Ab. 392. *Nandick v. Wilks*, *ibid.* 393. *Streatfield v. Streatfield*, Ca. Temp. Talb. 176. See also *Trevor v. Trevor*, 1 P. W. 622. *Cussack v. Cussack*, 5 Bro. Rar. Ca. 116, ed. 1803. [*Davies v. Davies*, 4 Beav. 54.] The case of *Chambers v. Chambers*, 5 Vin. 513. *Fitz-Gib.* 127, is an exception to the rule. In that case, an estate to be purchased with trust-money was agreed to be settled on the husband for life, with remainder to his first and other sons successively in tail; and it was covenanted that another estate should be settled upon the husband and the heirs male of his body. It was determined that the latter agreement did not authorise limitations in strict settlement; for by the former agreement, the parties appear to have understood the effect of words of purchase. It should seem, that where by articles the husband's estate is agreed to be settled upon the intended wife, "and the heirs of her body," the court will not order it to be settled otherwise: for the estate being *ex provisioe viri*, it is protected from the alienation of the tenant in tail by the statute 11 Hen. 7. [This protection is continued by the Act 3 & 4 W. 4, c. 74, s. 16.] See *Green v. Ekins*, 2 Atk. 473. *Honor v. Honor*, 1 P. W. 123. *Whateley v. Kemp*, 2 Ves. 358. [But although a settlement be not such as a court of equity would have directed, that will not affect the construction of it in a court of law. *Doe v. Woodroffe*, 10 Mee. & Wels. 608.]

² *Glenorchy v. Boswell*, Ca. Temp. Talb. 3, 19.

³ *Papillon v. Voice*, 2 P. W. 471. *Bagshaw v. Spencer*, 2 Atk. 570, 581.

⁴ *White v. Carter*, Amb. 670.

⁵ *Bastard v. Proby*, cited by Mr. Cox, 2 P. W. 478.

⁶ *Read v. Snell*, 2 Atk. 642. ⁷ *Leonard v. Earl of Sussex*, 2 Vern. 526.

⁸ *Roberts v. Dixwell*, 1 Atk. 607. [And see *Stonor v. Curwen*, 5 Sim. 264. See also *Woolmore v. Burrows*, 1 Sim. 512, as to the manner in which an executory trust created by will, and *Bankes v. Le Despenser*, 11 Sim. 508, as to the manner in which such a trust created by deed, were respectively directed to be executed. But none of the above-mentioned expressions when used in a will,

But to authorise this latitude of construction in the case of wills, the intention of the testator must appear; and, therefore, under a simple direction to convey an estate to A. and the heirs of his body, A. will be entitled to an estate tail.¹

[*340] *The ground, therefore, of construction respecting words of limitation, differs in wills and marriage-articles: in wills it is the intention of the testator manifestly appearing; and in articles, the nature of the transaction, and the presumed objects of the parties.²

The late Mr. Fearne³ thought, that a power of selling, not expressly authorised by marriage-articles, might be introduced into a settlement made in pursuance of them, and would be supported in equity; but it has been decided in a late case of a will,⁴ that the introduction of [*341] a power of selling in a settlement was not authorised, when the will was silent as to the power.⁵

or others equally demonstrative of intention, as that "the aforesaid limitations shall be in strict settlement," will convert words of limitation into words of purchase, unless there be an executory trust, as a direction to convey or settle the estate. *Douglas v. Congreve*, 1 Beav. 59.]

¹ See *Stanley v. Stanley*, 16 Ves. 491.

² See *Legate v. Sewell*, 1 P. W. 87, 90. *Bale v. Coleman*, ib. 142, 2 P. W. 474. See the Master of the Rolls' argument in *Blackburn v. Stables*, 2 Ves. & Bea. 367, 370; and see *Jervoise v. Duke of Northumberland*, 1 Jacob & W. 559.

³ [In *Lord Deerhurst v. the Duke of St. Albans*, 5 Madd. 260, the Vice-Chancellor, Sir John Leach says, "The distinction" (between marriage articles and a will) "is, you are guided to the meaning of articles by the plain object of consideration in them, the issue of the marriage; but you know nothing of the motive and object of a will, but what you collect from the language of it."

In *Stratford v. Powell*, 1 Ball & Beattie, 25, Lord Manners, C. considers that there is another distinction between wills and marriage articles, namely, "that in the latter every person is considered as a purchaser who is a party to them; in a will, none of the parties mentioned in it are so: in marriage articles they are all purchasers, to effectuate the intention of the parties; whereas, in wills, the intention of the testator is alone to be considered." The court will interfere in the case of executory trusts, whether the property be real or personal. See *Stonor v. Curwen*, 5 Simon, 264, for a case of the latter description.]

⁴ *Posth. Works*, 309. And see *Peake v. Penlington*, 2 Ves. & Bea. 311.

⁵ *Wheat v. Hall*, 17 Ves. 80. *Brewster v. Angel*, 1 Jacob & Walk. 625.

⁶ [In the case of *Higginson v. Barneby*, 2 Sim. & Sta. 516, it was held, that the insertion in a settlement of a power to charge with portions for younger children, was not warranted by a will, which, after directing the insertion of powers of jointuring, selling and exchanging, and leasing, declared that there should be contained in the settlement "all other clauses, powers, and provisions usually inserted in settlements or deeds of that kind." But in *Hill v. Hill*, 6 Sim. 136, where by marriage articles it had been agreed that estates should be settled in strict settlement, and that there should be contained in the settlement powers to the husband to charge the estates with certain sums, and to create terms for raising those sums; "and likewise all other powers, provisions, clauses, cove-

In the execution of an executory trust the court will direct a limitation to be inserted in the *settlement to preserve contingent remainders;⁶ and both in wills⁷ and marriage-articles,⁸ cross remainders may be raised by implication.

In the case of the Duke of Newcastle *v.* Lincoln,⁹ a conveyance was made before, and in consideration of, marriage, of real estates in strict settlement, with a covenant to assign leasehold estates to trustees, "in trust for such person or persons, and for such or the like ends, intents, and purposes as are thereinbefore mentioned of and concerning the said castles, &c., as far as the law would in that case permit;" and Lord Rosslyn thought, that the settlement should be so framed, that no person, being tenant in tail by purchase, should become entitled to a vested interest in the leasehold estate, until he attained twenty-one, or, dying under that age, unless he left issue inheritable to the entail.

VI. To prevent the inconveniences which arose from parol declarations and secret transfers of uses, the statute 29 Car. 2, c. 3, s. 7, requires that "all *declarations or creations of trusts or confidences of any

nants, and agreements usually inserted in settlements of the like nature, and which shall be proper for effecting any of the purposes aforesaid;" it was held, that a power of sale and exchange might be introduced into the settlement: the Vice-Chancellor, Sir L. Shadwell, observing, that "there was a palpable distinction between inserting in a settlement powers for the management and better enjoyment of the settled estates which are beneficial to all parties, and powers which confer personal privileges on particular parties, such as powers to jointure, to raise money for any particular purpose," &c. (See also *Peake v. Penlington*, 2 Ves. & B. 311. *Williams v. Carter*, cited in Sugden on Powers.) And in *Lindow v. Fleetwood*, 6 Sim. 152, under a clause in a will, directing the insertion in the intended settlement of "all such other proper and reasonable powers as are usually inserted in settlements of the like nature;" it was held, that a power to appoint new trustees might be inserted. See also *Duke of Bedford v. Marquess of Abercorn*, 1 My. & Cr. 312, where the insertion of a power to jointure a future wife, or to charge portions for younger children of a future marriage, was held not to be authorised; but powers of sale and exchange and leasing appear to have been considered admissible, and directions were given in accordance with that view.]

⁶ *Baskerville v. Baskerville*, 2 Atk. 279. *Stamford v. Hobart*, 3 Bro. Par. Ca. 31, ed. 1803.

⁷ *Green v. Stephens*, 12 Ves. 419. 17 Ves. 64. *Maryatt v. Townley*, 1 Ves. 102, 104.

⁸ *Twisden v. Lock*, Amb. 663. *Duke of Richmond v. Lord Cadogan*, cited 17 Ves. 67. *West v. Erissey*, 2 P. W. 349. *Horne v. Barton, Cooper*, 267.

⁹ 3 Ves. 387. 12 Ves. 218. See also *Gower v. Grosvenor*, Barn. 54, and 2 Ves. & Bea. 63, in *Lord Southampton v. Marquess of Hertford*.

lands, tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing;" and by the ninth section, "that all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise."(a)

This statute, it is said, does not extend to the declaration or creation of trusts of mere personality.¹

(1.) There is no regular form prescribed by the courts of equity for the declaration or creation of the trust.(b) Therefore a note, or memorandum in writing from a trustee, promising to execute a declaration of trusts,² or

¹ See *Nab v. Nab*, 10 Mod. 404. *Fordyce v. Willis*, 3 Bro. Cha. Ca. 587, 1 P. W. 9. [And see *Benbow v. Townsend*, 1 Myl. & K. 510. *M'Fadden v. Jenkyns*, 1 Hare, 480, 1 Turn. & Phil. 153. But though it is not necessary that a declaration of trust, as to personal property, should be by a written instrument, yet the intention to declare a trust should be irrevocably expressed; and in *Bayley v. Boulcott*, 4 Russ. 345, a conversation expressing an intention to make a future declaration of trust, was held not to be sufficient.]

² *Bellamy v. Burrow*, Ca. Temp. Talb. 97.

(a) Parol may not contradict the face of the deed to prove a trust. *Phillirook v. Delano*, 16 Shep. (29 Maine,) 210; *Rathbun v. Rathbun*, 6 Barb. Sup. Ct., (N. Y.) 98; *Hovey v. Holcomb*, 11 Illinois, 660; *Church v. Church*, 4 Yeates, (Penns.) 280; *Fox v. Heffner*, 1 W. & S. (Penns.) 372; *Sample v. Coulson*, 9 W. & S. (Penns.) 62; *Jackman v. Ringland*, 4 W. & S. (Penns.) 149; *Sidle v. Walters*, 5 W. (Penns.) 391; *Jackson v. Moore*, 6 Cow. (N. Y.) 706; *Jackson v. Myers*, 3 Johns. (N. Y.) 388; *Jackson v. Cary*, 16 Johns. (N. Y.) 302.

The Pennsylvania Act of Frauds, (21st March, 1772,) having omitted from its provisions the 7th, 8th, and 9th sections of the English statute, the question of its applicability at all to trust estates, after having been in many cases suggested and doubted, (see *Peebles v. Reading*, 8 S. & R. 483; *Slaymaker v. St. John*, 5 W. 27; *Swartz v. Swartz*, 4 Barr, 359; *Randall v. Silverthorn*, 4 Barr, 177;) though seemingly often assumed, if not absolutely decided in the affirmative, (See *Church v. Church*, 4 Yeates, 280; *Hainer v. O'Connor*, 10 W. 313; *Kissler v. Kissler*, 2 W. 323; *Sidle v. Walters*, 5 W. 391; *Fox v. Heffner*, 1 W. & S. 372; *Jackman v. Ringland*, 4 W. & S. 149; *Sample v. Coulson*, 9 W. & S. 62;) was in the case of *Murphy v. Hubert*, 7 Barr, 420, decided negatively, and the law held to be, that the Act of 1772 gives no protection against the admissibility of parol evidence, to show a trust of land in contradiction of the words of the deed by which it is held. The correctness of this decision has been most ably reviewed by an anonymous writer, and apart from the argument from authority upon the Pennsylvania cases, and the question of the necessity of the 8th section in the English statute of frauds, in order to have comprehended these trusts as well as legal estates, the argument upon the meaning of the words of the act of 1772, "all estates or interests in lands, tenements or hereditaments," under the Pennsylvania system administering equity without a court of chancery through common law courts, seems to be most conclusive. As the author concludes, if *Murphy v. Hubert* is the law, the public safety requires a new enactment by the Legislature. (See pamphlet, 1848.)

(b) See *Prevost v. Gratz*, 1 P. C. C. (Penns.) 366; *Donnaheo v. Conrahy*, 2 Jones & Lat. 688.

confessing that he purchased lands with another man's money;³ or a bond from a trustee, either to perform the trusts of a conveyance, in which no trusts are mentioned,⁴ "or to make an assignment as his cestui que trust" [*344] shall direct;⁵ a recital in a purchase-deed, that the consideration-money belonged to a third person;⁶ an answer in chancery, confessing a trust;⁷ a letter from a trustee disclosing the purposes of a devise to him;⁸ these, and indeed any writing in the shape of mutual covenants or articles of agreement⁹ relative to the transfer or produce of land, although without seal or stamp,¹ if they properly discover the intention of the parties, are sufficient in a court of equity, to create trusts.

(2.) As there is no regular form for a declaration, so there is no particular set of words, nor mode of expression prescribed by the statute, or adopted by the courts of equity, for the purpose of raising trusts. It has, therefore been repeatedly decided, that any words in a will, intimating, or in the nature of a request, wish, desire, recommendation, &c., are sufficient to create a trust if the object of the gift, and the gift itself, can be correctly ascertained.^{2(a)} But if the certainty of the gift

³ *Lane v. Dighton*, Amb. 409. See *Ambrose v. Ambrose*, 1 P. W. 322. Ryall v. Ryall, 1 Atk. 59.

⁴ *Goodwin v. Cutler, Finch*, 356.

⁵ *Moorcroft v. Dowding*, 2 P. W. 314.

⁶ *Kirk v. Webb*, Prec. Ch. 84. *Deg v. Deg*, 2 P. W. 415. Ryall v. Ryall, 1 Atk. 59.

⁷ *Hampton v. Spencer*, 2 Vern. 288. *Cottington v. Fletcher*, 2 Atk. 155.

⁸ *Crook v. Brookeing*, 2 Vern. 106.

⁹ *Legard v. Hodges*, 3 Bro. Cha. Ca. 531.

¹ *Hodsdon v. Lloyd*, 3 Bro. Cha. Ca. 534.

² *Eales v. England*, Prec. Ch. 200. 2 Vin. 466, S. C. 1 Eq. Ab. 297, pl. 3, S. C. *Cloudaley v. Pelham*, 1 Vern. 411. *Jones v. Nabbs*, 1 Eq. Ab. 404, pl. 3. *Richardson v. Chapman*, 1 Barn, Eccl. Law, 225. *Vernon v. Vernon*, Amb. 3. 2 Bro. Cha. Ca. 227, S. C. cited. *Clifton v. Lombe*, Amb. 519. *Massey v. Sherman*, Amb. 520. *Nowlan v. Melligan*, 1 Bro. Cha. Ca. 489. *Pierson v. Garnett*, 2 Bro. Cha. Ca. 38, 226. *Finch*, Prec. Ch. 200, in note, S. C. *Davis v. King*, 2 Bro. Cha. Ca. 600. *Taylor v. George*, 2 Ves. & B. 378. *Forbes v. Ball*, 3 Mer. 437. *Parsons v. Baker*, 18 Ves. 476. [Lechmere v. Lavie, 2 Mylne & Keen, 197.

(a) See Pennock's Estate, 8 Har. (Penn.) 268, where the English and American cases on this subject are revised, and it is held that "words in a will expressive of desire, recommendation and confidence are not words of technical but of common parlance, and are not *prima facie* sufficient to convert a devise or bequest into a trust, and the old Roman and English rule on this subject is not part of the common law of Pennsylvania;" that "such words may amount to a declaration of trust, when it appears from other parts of the will that the testator intended not to commit the estate to the devisee or legatee, or the ultimate disposal of it to his kindness, justice or discretion."

[*345] and object fail, then the *trust must also fail, although the intention to create it should appear evident upon the face of the will.³

(3.) When an estate is vested in trustees in fee-simple, in trust to raise a sum of money, without specifying the particular mode of raising it, the trust will authorise a [*346] sale;⁴ and as a devise *of the “*rents and profits*”⁵ of an estate will, at law, carry the land itself, it has been determined, that a trust to raise money by “*rents and profits*,” will empower the trustees to sell,⁶ unless there are some words to restrain the sense of those words to “annual” profits.⁷

In the anonymous case, 1 Vern. 104, a distinction is taken between a deed and a will, as to the operation of

Sale *v.* Moore, 1 Sim. 534. Benson *v.* Whittam, 5 Sim. 22. Bardswell *v.* Bardswell, 9 Sim. 319. Pope *v.* Pope, 10 Sim. 1. Knight *v.* Knight, 3 Beav. 148. Ford *v.* Fowler, ib. 146. Wood *v.* Cox, 2 My. & Cr. 684. Raikes *v.* Ward, 1 Hare, 445. Pilkington *v.* Boughey, Jur. 1841, p. 1149.]

³ Harding *v.* Glyn, 1 Atk. 469. Le Maitre *v.* Bannister, 2 Bro. Cha. Ca. 40, cited Finch Prec. Ch. 201, S. C. Bland *v.* Bland, 2 Bro. Cha. Ca. 43, cited Finch Prec. Ch. S. C. Harland *v.* Trigg, 1 Bro. Cha. Ca. 142. Wynne *v.* Hawkins, 1 Bro. Cha. Ca. 180. Sprange *v.* Bernard, 2 Bro. Cha. Ca. 585. Note the case of Cunliffe *v.* Cunliffe, Amb. 686. Finch Prec. Ch. 201, S. C. 2 Bro. Cha. Ca. 42, S. C. was overruled by the Master of the Rolls in the case of Pierson *v.* Garnett, 2 Bro. Cha. Ca. cited supra. See 2 Bro. Cha. Ca. 46. Hill *v.* Bishop of London, 1 Atk. 620. [See also the cases cited in the last note.]

⁴ Baines *v.* Dixon, 1 Ves. 41. Wareham *v.* Brown, 2 Vern. 153. Newman *v.* Johnson, 1 Vern. 45. See 8 Vin. 461, pl. 7, 8, notes. [And it seems that whenever trustees have authority to sell for the purpose of raising money, whether such authority arises from an express direction to sell, or by implication from the nature of the trust, they will have power to mortgage also: Ball *v.* Harris, 8 Sim. 485; 4 My. & Cr. 264, S. C.: unless in the case of an express direction to sell, there be apparent an intention, on the part of the creator of the trust, that the estate should be converted out and out. Haldenby *v.* Spofforth, 1 Beav. 390.]

⁵ [Stewart *v.* Garnett, 3 Sim. 398. And an indefinite gift of dividends will give the absolute property in stock. Page *v.* Leapingwell, 18 Ves. 467.]

⁶ Gibson *v.* Rogers, Amb. 93. 8 Vin. 461, pl. 7, 8, 9, 10, 11. Liningen *v.* Foley, 2 Cha. Ca. 205. Allian *v.* Backhouse, 2 Ves. & B. 65. [And see Bootle *v.* Blundell, 1 Mer. 232. Players *v.* Abbott, 2 My. & Keen, 97.]

⁷ Ivy *v.* Gilbert, 2 P. W. 13. Evelyn *v.* Evelyn, 2 P. W. 666. Mills *v.* Banks, 3 P. W. 8. Anon. Vern. 104. Green *v.* Belcher, 1 Atk. 506.

[In Wilson *v.* Halliley, 1 Russ. & Mylne, 590, where the direction was to “levy and raise out of the rents and profits of my said real estate the sum of 5,850*l.*,” the Master of the Rolls said, “Whether the 5,850*l.* is to be raised out of annual rents and profits, or by sale or mortgage, is a mere question of intention, to be collected from the context of the will, or from the purposes to which the money is to be applied. If those purposes require the immediate payment of the money then it must be intended that the testator could not mean satisfaction by annual rents and profits, but by sale or mortgage;” and he decided in that case that the sum was to be raised out of the annual rents or profits, and not by sale or mortgage.]

the words "rents and profits :" but there does not appear to be any ground for this distinction.⁸

*VII. By the eighth section of the statute 29 Car. 2, c. 3, it is provided, "that where any conveyance shall be made of any lands or tenements, by which a trust or confidence shall or may arise or result by the implication or construction of the law, or be transferred or extinguished by an act or operation of law, then and in any such case such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made."⁹(a)

In the case of *Lamplugh v. Lamplugh*,¹ it was said, that this section must relate to trusts and equitable interests, and cannot relate to a use, which is a legal estate : and it is observable, that parol evidence may be admitted to rebut a resulting trust.²

⁸ See *Trafford v. Ashton*, 1 P. W. 418.

⁹ The 7 Will. 3, c. 12, s. 7, 9, 10, 11, in Ireland is similar to 29 Car. 2, c. 3. 1 P. W. 112.

¹ 2 Vern. 294. 1 P. W. 112. [That is to say, a trust which results from legal presumption only ; but a trust which results from any defect in the instrument creating it, (the intention to create a trust of some sort or the other being ambiguous,) cannot be rebutted by extrinsic or parol evidence, for that would be to amend or contradict the instrument itself. *Langham v. Sanford*, 19 Ves. 643. *Gladding v. Yapp*, 5 Madd. 59.

In all cases in which a presumption arises by the mere implication of law, there parol evidence may be admitted to rebut it ; and where such evidence is used to rebut a presumption, there parol evidence may be used also to confirm it. *Bishop of Cloyne v. Young*, 2 Ves. 61. For cases on the admission of evidence to rebut or confirm resulting trusts arising out of stock transferred, or money paid, or purchases made by one person in the name of another, see *Graham v. Graham*, 1 Ves. jun. 275, (money;) *George v. The Bank of England*, 7 Price, 646, (stock;) *Rider v. Kidder*, 10 Ves. 360, (stock;) *Finch v. Finch*, 15 Ves. 43; *Dyer v. Dyer*, 2 Cox, 93; *Carter v. Ratty*, 12 July 1745, MSS. cited, 2 Madd. Chancery, 113, (land purchased in the name of a stranger;) *Morlass v. Franklin*, 1 Swanst. 17. *Pranker v. Pranker*, 1 Sim. & Stu. 1; *Lamplugh v. Lamplugh*, 1 P. W. 111, 6th ed. and cases cited in note; *Dyer v. Dyer*, 2 Cox, 93; *Taylor v. Taylor*, 1 Atk. 386; *Ebrand v. Dance*, 2 Ch. Ca. 26, (land purchased in the name of a son, or a grandson, the father being dead.) It will be remembered that in these two latter instances the presumption is, that the purchase is intended as an advancement for the child, or grandchild, in whose name the purchase is made ; but in the case of a stranger, the presumption is, that the person named is merely a trustee for the person making the purchase. And note, that where land is purchased with the money of A., in the name of B., the resulting trust to A. may be rebutted as to part of the interest in the land. *Benbow v. Townsend*, 1 Mylne & K. 506.]

(a) *Jackson v. Feller*, 2 Wend., (N. Y.) 465; *Foote v. Colvin*, 3 Johns., (N. Y.) 216; *Harder v. Harder*, 2 Sandf. Ch., (N. Y.) 17; *Reid v. Fitch*, 11 Barb., Sup. Ct., (N. Y.) 399; *Livermore v. Aldrich*, 5 Cush., (Mass.) 431; *Coates v. Woodward*, 13 Illinois, 654; *Faringer v. Ramsay*, 2 Md., 365; *Lloyd v. Carter*, 5 Har., (Penns.) 216; *Stimpfle v. Roberts*, 6 Har. (Penns.) 283; *Neil v. Keese*, 5 Texas, 23.

[*348] *The following are instances of trusts, arising from the operation or construction of equity.

(1.) When an estate is subject to a trust or equitable interest, and a person purchases it for a valuable consideration, with notice of the trust or equitable interest, the estate will be subject to it in the hands of the purchaser;^{3(a)} and a person *acquiring an estate as [*349] a mere voluntary grantee, even without notice,⁴ or as a devisee,⁵ will take it subject to every beneficial or equitable lien. The principle has been extended to that

³ Saunders *v.* Dehew, 2 Vern. 271. Langton *v.* Astrey, 2 Cha. Rep. 30. 3 Atk. 238. Daniels *v.* Davison, 16 Ves. 249. "Though he had no notice before he paid his money, yet he had notice before the execution of the conveyance, and it is all but one transaction." Per Lord Hardwicke in Wigg. *v.* Wigg, 1 Atk. 383. [And see Malpass *v.* Ackland, 3 Russ. 273. Miles *v.* Langley, 1 Russ. & My. 39. 2 Russ. & My. 626, S. C.]

Under this head may be classed those cases where leases have been made at an under value by trustees to charitable uses. See Attorney-General *v.* Magwood, 18 Ves. 315, and the cases there referred to, and Attorney-General *v.* Brooke, *ibid.* 319.

[Notice is either actual or constructive, the consequences of both being the same. Ambl. 626. And notice, whether actual or constructive, to the attorney or agent of the party, if in the same transaction, or in another shortly previously to, and connected with it, or clearly present to the mind of the attorney or agent, is the same thing as notice to the party himself. 3 Sim. 307. Hargreaves *v.* Rothwell, 1 Keen, 154. Dryden *v.* Frost, 3 My. & Cr. 670. Constructive notice is, in fact, evidence of notice, from which the court presumes that the party must have had actual notice; and there are many circumstances which may constitute this evidence, it being a rule that whatever is sufficient to put a party upon an inquiry is good notice. 1 Atk. 490. Thus, a purchaser taking a conveyance from a vendor who has not possession of the title-deeds, will take it with notice of any claim which the party in possession of the title-deeds may have. Dryden *v.* Frost, *ubi supra*. And a general recital in a deed, that there are mortgages on the estate, will affect parties claiming under the deed with notice of a mortgage not specified therein. Farrow *v.* Rees, 4 Beav. 18. See also Eland *v.* Eland, 1 Beav. 235, 4 My. & Cr. 420, S. C. Jones *v.* Smith, 1 Hare 43, and the cases there cited. It appears from the case of Jones *v.* Smith (in which there is an appeal now pending) that notice of the existence of a settlement, though clearly notice of all the trusts of the settlement (3 Russ. 273,) does not of itself amount to constructive notice that a particular property is comprised in it. So notice that an estate is in the possession of a tenant is not only notice of a lease, but also of an equitable title in the tenant under an agreement to purchase. Daniels *v.* Davison, 16 Ves. 249. Miles *v.* Langley, 1 Russ. & My. 39. 2 Russ. & My. 626. Hanbury *v.* Litchfield, 2 My. & Keen, 629. But it was held in the last-mentioned case, that a purchaser is not bound to pursue his inquiries, through every derivative lease, up to the original lessee. See also Sutherland *v.* Brigg, 5 Jur. 1151.]

⁴ See 1 Co. 121, b., Pye *v.* George, 2 Salk. 680.

⁵ Mario *v.* Smith, 2 P. W. 200.

(a) Harrisburg Bank *v.* Tyler, 3 W. & S., (Penn.) 373; School Directors *v.* Drenkleberger, 6 Barr, (Penn.) 29; Walsh *v.* Still, 2 Parsons, (Penn.) 17; Webster *v.* French, 11 Ill. 254; Man *v.* Chester, 1 Swan., (Tenn.) 416.

equitable *lien which a vendor has for any part [*350] of his purchase-money remaining unpaid.¹

In the application of the above rule, it has been determined, that notice of a bargain and sale not inrolled,² of a deed not registered,³ and of a judgment not docketed,⁴ will affect the purchaser: the Court of Chancery thereby giving an equitable validity to an instrument, which the legislature has expressly declared shall have no legal operation against a purchaser.

But a person purchasing with notice of a voluntary conveyance, under the statute 27 Eliz. c. 4, will not be bound by it;⁵ for the statute makes the voluntary conveyance constructively fraudulent; and the purchaser, buying with notice of a *fraud, is not by the [*351] means of that notice converted into a trustee.

If a person purchases of a trustee for a valuable consideration without notice, he will hold discharged of the trust; but if the original trustee repurchases the estate, he will be again converted into a trustee, notwithstanding the first purchaser has levied a fine, and five years non-claim had run upon it.⁶ But a stranger, who purchases with notice from a person who purchased for a valuable consideration without notice, may, it is conceived, shelter himself under the first purchase.⁷

It is not clear how far a purchaser may be affected by notice of a constructive or doubtful trust. It is to be lamented that he is subject to it in any case. Where a

¹ Mackreth v. Symmons, 15 Ves. 329. Grant v. Mills, 2 Ves. & B. 306. [See Davies v. Thomas, 2 Youn. & Coll. 234.]

² 3 Atk. 651, 652.

⁴ Le Neve v. Le Neve, 3 Atk. 646.

³ Davis v. Earl of Strathmore, 16 Ves. 419. [But so far as the operation of a judgment, under the act 1 & 2 Vic. c. 110, (ss. 11, 13 and 19,) is concerned, notice of the judgment will not affect a purchaser, unless a minute of such judgment has been left with the senior master of the Court of Common Pleas, as mentioned in the act. See 3 & 4 Vic. c. 82, s. 2.]

⁵ See Doe ex dem. Otley v. Manning, 9 East, 59. [Currie v. Nind, 1 My. & Cr. 17. Doe dem. Baverstock v. Rolfe, 8 Adol. & El. 650. A mortgagee is a purchaser, *pro tanto*, under this act, Cow. 278. 1 Adol. & El. 733. But a party with whom title-deeds have been deposited as a security for money is not regarded as a purchaser under the act, at law, since by means of the deposit he acquires no more than a right to go into a court of equity to compel a legal conveyance. 9 Bing. 76.]

⁶ Bovey v. Smith, 1 Vern. 60. 2 Ch. Ca. 124, S. C.

⁷ See Lowther v. Carlton, 2 Atk. 242, and the cases in the note to the last ed.: and see 11 Ves. 478, in M'Queen v. Farquhar. [See also Bennett v. Walker, 1 Vent. 130, and Sugd. on Vend. & Pur. vol. ii. p. 448, 10th ed. There seems to be no doubt upon the subject.]

settlement was made in pursuance of articles, and, pursuing the exact words of the articles, gave an estate tail to the husband, instead of limiting the estate to him for life, with remainder to his first and other sons in strict settlement, it was determined, that a purchaser with notice of the articles (which were of long standing), [*352] would not be affected, by reason of *the notice, with a trust for the benefit of the issue;⁴ and in the case of *Cordwell v. Mackaril*,⁵ the Chancellor says, "I am unwilling to think, that the subjects are bound to take notice of the rules of equity, as they are of a court of law. They must take notice of a deed, on which an equity arises, supported by precedents, the justice of which every body must acknowledge, as prior incumbrances, but not the mere construction of words, which are uncertain in themselves, and often depend on the locality of them."⁶

(2.) If an estate be purchased in the name of one person, and the consideration-money belong to, or be paid by, another, the estate so purchased will be subject to a trust in favour of the person claiming, or paying, the money; although there be no express declaration for that purpose.⁷ (a)

⁴ See *Warwick v. Warwick*, 3 Atk. 293. *Senhouse v. Earle*, Amb. 285. The case of *Powel v. Price*, 2 P. W. 535, seems to have been determined upon the same principle. In the case of *Parker v. Brooke*, 9 Ves. 583, the Master of the Rolls, alluding to the case of *Senhouse v. Earle*, said, that "Lord Hardwicke took it to be clear, that if the articles had been modern, he must have reformed them even against a purchaser." It is observable, that in *West v. Erissey*, 2 P. W. 349, the plaintiff did not attempt to impeach the purchasers.

⁵ Amb. 515. [2 Eden, 347.]

⁶ See *Hardy v. Reeves*, 5 Ves. 426. [Sir Edward Sugden, in his *Vend. & Purch.* vol. iii. p. 479, 10th ed. considers that "certainly a court of equity would not enforce a purchaser to take such a title," (a title depending on the constructive trust mentioned in the text), "although no relief might be granted to his prejudice if he actually had purchased."]

⁷ *Lloyd v. Spillet*, 2 Atk. 150, 257. 1 Atk. 60. 1 Vern. 366. 4 Bro. P. C. 67. *Wray v. Steele*, 2 Ves. & B. 388, which was the case of a joint advance. [And a custom inconsistent with this doctrine of resulting trusts, as that a person named by the purchaser of a copyhold estate shall take beneficially, has been held to be unreasonable and void as against the right in equity of the purchaser. *Lewis v. Lane*, 2 My. & Keen, 449.] But according to the policy of the registry acts (26 Geo. 3, c. 60. 34 Geo. 3, c. 68), the registry of a ship is conclusive evidence of the equitable as well as legal property. *Ex parte Houghton*, 17 Ves. 251. "There can be no such thing as the equitable ownership of a ship." *Dixon v. Ewart*, 3 Mer. 333. See *Ryle v. Haggie*, 1 Walker & Jac. 234. [But these registry acts do not affect titles passing by operation of law. 5 Mau. & Sel. 239.]

(a) *Foote v. Colvin*, 3 Johns. (N. Y.) 216; *Jackson v. Morse*, 16 Johns. (N. Y.)

*In order to raise a trust of this kind, the fact [*353] of the ownership of the money should appear upon the face of the deed, either by a recital, or by expressions which amount to a necessary implication or presumptive proof of it.⁸ If, however, it be expressly stated in the conveyance, that the money was paid by the nominal purchaser, and nothing shall appear to explain the nature of the transaction, then, if in his lifetime such nominal purchaser shall, by any note or memorandum in writing,⁹ or by his answer to a bill filed against him, for a recovery thereof (though he shall at the same time plead the Statute of Frauds),¹ confess the purpose for which the purchase was made; or if, after his death, he shall leave any papers disclosing the real circumstances of the case;² in all *these instances [*354] the court will raise the trust, even against the express declaration of the purchase-deed. If, indeed, upon a bill filed against him for a discovery, the nominal purchaser deny the facts by his answer, and insist upon

⁸ See 2 Vern. 168. Prec. Ch. 104. *Kirk v. Webb*, ib. 84. *Denton v. Davis*, 18 Ves. 499.

⁹ See ante, 343, and *O'Hara v. O'Neil*, 2 Eq. Ab. 745, and *Vin. tit. Trust (E.)*

¹ *Cottington v. Fletcher*, 2 Atk. 155. But see *Edwards v. Moore*, 4 Ves. 23.

² *Ryall v. Ryall*, Amb. 413. *Lane v. Dighton*, ib. 409.

187; *Getman v. Getman*, 1 Barb. Ch. (N. Y.) 514; *Thomas v. Walker*, 6 Hump. (Tenn.) 93; *German v. Gabbald*, 3 Binn. (Penns.) 302; *Kissler v. Kissler*, 2 W. (Penns.) 323; *Wallace v. Duffield*, 2 S. & R. (Penns.) 521; *Gregory v. Setter*, 1 Dall. (Penns.) 193; *Ulrich's Heirs v. Beck*, 1 Har. (Penns.) 639; *Magee v. Magee*, 1 Barr. (Penns.) 405; *Pegues v. Pegues*, 5 Ired. Eq. (N. Car.) 418; *Smith v. Salkett*, 5 Gilman (Ill.) 534; *Mahorner v. Harrison*, 13 S. & M. (Miss.) 53; *Baker v. Vining*, 17 Shep. (30 Maine) 121; *Tarpley v. Poage*, 2 Texas, 139; *Livermore v. Aldrich*, 5 Cush. (Mass.) 431; *Brooks v. Dent*, 1 Maryland Ch. Decis. 523; *Hollis v. Hays*, ib. 479; *Barron v. Barron*, 1 Deane (24 Vermont) 375; *Dow v. Jewell*, 1 Foster (N. Hamp.) 470; *Stimpfle v. Roberts*, 6 Har. (Penns.) 283; *Neill v. Keeso*, 5 Texas, 23; *Williams v. Turner*, 7 Geo. 348; *Paul v. Choateau*, 14 Mis. 580; *Stephenson v. Thompson*, 13 Illinois, 186; *Alexander v. Tams*, id. 221.

If a partner buys land with the partnership funds, and takes a deed in his own name, a trust results to the partnership. *Philips v. Cramond*, 2 W. C. C. B. (Penns.) 397.

But not in favor of one incapable in law of holding, as an alien. Ib.

A trust will not result to one who pays a part only of the consideration on the purchase of land conveyed to another, unless it be some definite part of the whole, as one-half, one-third, or the like. *Sayre v. Townsend*. 15 Wend. (N. Y.) 650.

An implied trust, arising from the payment of the purchase-money by a third person, cannot be established by parol against an adverse possession, in a suit brought more than twenty-one years after such payment. *Stimpfle v. Roberts*, 6 Har. (Penns.) 302.

the Statute of Frauds, it should seem that parol proof cannot be admitted to prove the trust;³ and it is conceived, that after the death of the supposed nominal purchaser, parol proof alone can in no instance be admitted against the express declaration of the deed.⁴ The cases of *Ryall v. Ryall*,⁵ and *Lane v. Dighton*,⁶ are by no means authorities against this construction; for, as to the former, it will be found, upon examining Mr. Ambler's report of it,⁷ that the inquiry was directed only as to 250*l.*, which appeared by papers of the testator to have been trust-money: and as to the latter, there was evidence in the case under Mr. Dighton's handwriting, that the trust stocks had been sold, and the money laid out from time to time in the purchase of land. In *Lieberman v. Harcourt*, 2 Mer. 513, the money was followed by the evidence of the banker's books, and of the clerks in the house. But that was the case of stock.

*The preceding observations have been adopted [*355] by one intelligent writer,⁸ and they have been controverted by another,⁹ upon the ground, "that the Statute of Frauds is not more broken in upon by admitting parol proof after the death of the nominal purchaser, than by allowing such proof in his lifetime." The question, however, will still be, whether the parol evidence of third persons can be admitted during the purchaser's life against his own express declaration. When upon the face of the instrument, or by other written evidence, it appears that the consideration paid by the grantee is the property of another person, there is an equitable presumption that the estate is purchased for the benefit of the person with whose money it was bought; and this resulting trust so created by a construction of equity, may be rebutted by parol evidence;

³ See *Skett v. Whitmore*, 2 Freem. 352. *Newton v. Preston*, Prec. Ch. 103. *Willis v. Willis*, 2 Atk. 71. *Cooth v. Jackson*, 6 Ves. 12. *Rowe v. Teed*, 15 Ves. 374. See *Evans v. Harris*, 2 Ves. & B. 361.

⁴ *Kirk v. Webb*, Prec. Ch. 84. 2 Freem. 229, S. C. *Heron v. Heron*, Prec. Ch. 163. *Halcot v. Markant*, ib. 168. *Kinder v. Miller*, ib. 172. 2 Vern. 440, S. C. *Deg v. Deg*, 2 P. W. 414.

⁵ 1 Atk. 59.

⁶ Amb. 409.

⁷ Amb. 413, S. C. cited.

⁸ Roberts on *Frauds*, 99.

⁹ Sugden on *Vend.* [Vol. iii. p. 257, 10th ed. *Leman v. Whitley*, 4 Russ. 423.]

for the trust itself, not being within the Statute of Frauds, may be repelled or varied without the aid of it.¹ But it is difficult to discover a principle upon which parol evidence alone can, consistently with the statute, be admitted to establish a fact, the effect of which, if established, is to create an equitable interest, and not to counteract a constructive trust previously raised.²

*The rule, which I have explained, is not applicable to the case of a purchase made by a father in the name of a son, unprovided for at the time of such purchase: for in that case the purchase shall be considered as an advancement for the son, and not as a trust for the father; although the father takes the possession and receives the rents and profits.³(a) It is the same, where the grandfather purchases lands in the name of a grandchild, the father being dead; for then the grandfather is *in loco parentis*.⁴

*In these cases the father cannot by a subsequent deed declare his son to be a trustee;⁵ nor

¹ See *Lamplugh v. Lamplugh*, 1 P. W. 113. *Taylor v. Alston*, cited in *Dyer v. Dyer*, Watk. 223.

² If the case of *Lench v. Lench*, 10 Ves. 511, is to be considered as an unqualified decision, establishing the admission of parol evidence alone, I must in course bow to the authority. After a devise of real estates the testator cannot create a trust upon the devise, by writing not attested by three witnesses. *Can v. Addington*, 3 Atk. 141. But it seems, that in a bill for discovery of a secret trust, the devisee will be bound to answer as to the fact. *Muckleston v. Brown*, 6 Ves. 52.

³ *Gray v. Gray*, 1 Eq. Ab. 381. 2 Swanst. 594. *Taylor v. Taylor*, 1 Atk. 386. 1 P. W. 111, 808. 2 Atk. 480. In *Gilbert's Lex Praetoria* (271,) it is said, "but if the father purchases in the name of his son, who is of full age, which by our law is an emancipation out of the power of the father; there, if the father takes the profits, or lets leases, or acts as the owner of the estate, the son is a trustee for the father; because there is the same resulting trust as if the son were a stranger, where the father acts as owner of the estate, since it was purchased with his money." See *Treatise of Eq.* vol. ii. p. 122. [And it is immaterial whether the son be legitimate or not. *Kilpin v. Kilpin*, 1 My. & Keen, 520.]

⁴ *Ebrand v. Dancer*, 1 Eq. Ab. 382. [*Kilpin v. Kilpin*, *ubi supra*.] So if a person purchase in the name of his wife, the wife is not a trustee for her husband. *Kingdom v. Bridges*, 2 Vern. 67. *Back v. Andrews*, Prec. Cha. 1. 2 Vern. 120. [*Dummer v. Pitcher*, 2 My. & Keen, 362. *Shuttleworth v. Greaves*, 4 My. & Cr. 35.] So, where a father purchases a copyhold estate, held for lives, and takes the grant in names of himself and his son in succession. The cases upon this head will be found in *Dyer v. Dyer*, Watk. 216. *Finch v. Finch*, 15 Ves. 43. [*Coates v. Stevens*, 1 Yo. & Col. 86. *Sidmouth v. Sidmouth*, 2 Beav. 447.]

⁵ 2 Cha. Ca. 231. The evidence of intention must be contemporaneous. *Murless v. Franklin*, 1 Swanst. 13. [*Coates v. Stevens*. *Sidmouth v. Sidmouth*, *ubi supra*.]

(a) *Dennison v. Goehring*, 7 Barr. (Penna.) 179; *Phillips v. Gregg*, 10 Watts, (Penna.) 171.

can the son himself, on his sick bed, make a declaration of trust in favour of his father, so as to prevent his own wife from dower.⁶

So, if a father buy in the names of his son and a trustee,⁷ or in the names of himself and son,⁸ in either case it is an advancement. But in these instances the father shall have the benefit of survivorship in case the son die during his minority; although the son shall not have the benefit of survivorship, as against the judgment creditor of the father.⁹

It seems that when the son is provided for at the time of the purchase, he stands in the situation of a stranger.¹ Where a grandmother, during the life of the father, invested 100*l.* in the purchase of an exchequer annuity in the name of a grandchild: the child's father gave a bond to the grandmother for the repayment of 100*l.* if the child died before the grandmother; the [**358] grandmother *received the income, and kept the tally, the grandchild making no claim; it was held to be a trust for the grandmother.²

(3.) When a voluntary conveyance is made with a declaration of trusts, as to a part only of the land, or of the estate or interest in it, there is a resulting trust in that case, for the grantor or his representatives, as to the part or interest of which there is no declaration;³ (*a*) as where A. granted an advowson to B. for ninety-nine years in trust to present a particular person, the beneficial interest in the term beyond the purpose for which the grant was made vested in the grantor.⁴

⁶ *Bateman v. Bateman*, 2 Vern. 406.

⁷ *Lamplugh v. Lamplugh*, 1 P. W. 111. [Crabb *a.* Crabb, 1 My. & Keen, 511.]

⁸ *Scroope v. Scroope*, 1 Cha. Ca. 27. *Back v. Andrews*, 2 Vern. 120.

⁹ *Stileman v. Ashdown*, 2 Atk. 477.

¹ *Elliott v. Elliott*, 2 Cha. Ca. 232.

² *Lloyd v. Read*, 1 P. W. 607.

³ *Barn. Cha. Rep.* 308. 2 Atk. 150.

⁴ *Cettington v. Fletcher*, 2 Atk. 156. [But an exception to the doctrine of resulting trusts exists in regard to gifts for charitable purposes. In every such case the charity will have the benefit of any augmentation in the revenues of the property, and not the heir by way of resulting trust, although the rents as they existed at the time of the gift were distributed by the donor himself, and were exhausted by the objects specified in such distribution. *Thetford School case*, 8 Co. 259. 2 Jac. & W. 307. It may be observed, that the stat. 9 Geo. 2,

(*a*) *Huston v. Hamilton*, 2 Binn. (Penns.) 387; *Kissler v. Kissler*, 2 Watts, (Penns.) 323.

The rule is applicable to devises. Where a testator creates an executory trust, or devise, to take effect within the limit allowed by law, and makes no disposition of the intermediate beneficial interest, *the trust or equitable estate will descend to the heir, [*359] until the contingency happens upon which the equitable executory devise is to arise: or, where the legal estate in fee-simple is devised to trustees, in trust for A. for life, with remainder to his first and other sons successively in tail, with remainder to the first and other sons of B. successively in tail, and A. dies without having had a son in the lifetime of B., who has no son then living; the legal estate of the trustees will support the contingent remainder to the sons of B.; and until the birth of B.'s son, or until such event becomes impossible by the death of B., the beneficial interest will descend to the testator's heir.⁵

*In the case of *Sherrard v. Lord Harborough*, [*360] Amb. 165, Bennet, Earl of Harborough, by his will devised all his manors, advowsons, &c. to trustees, in trust out of the rents and profits to pay to the succeeding earl an annuity of 1000*l.* for his life, and directed, that the surplus of the rents and profits should, during the life of the earl (the annuitant) be laid out in the purchase of lands, to be settled to such uses as the

c. 36, makes void not merely a charitable trust, but the estate clothed with it; though, of course, the trust only is void where the estate is vested in the trustees for other purposes. *Willet v. Sandford*, 1 Ves. sen. 186. *Pilkington v. Boughey*, Jur. 1841, p. 1149.]

⁵ *Hopkins v. Hopkins*, 1 Atk. 581. Ca. Temp. Talb. 44. Butl. Co. Litt. 271, b. S. C. *Stanley v. Stanley*, 16 Ves. 491. See *Chambers v. Brailsford*, 18 Ves. 368. 2 Mer. 25. [And "if in a grant or devise there be a limitation in fee which is wholly void, no estate passes, and the use remains in the grantor, or results to the heir of the testator. So, if the void limitation be not of the fee, but of a partial interest only, as an estate for life, the use of such partial interest in like manner remains in the grantor, or results to the heir of the testator." Per Sir John Leach, Master of the Rolls, in *Lomas v. Wright*, 2 Myl. & K. 778, where he impugns the doctrine attempted to be established in that case, that where a limitation is simply void, as in the devise to a monk for life, the person next in remainder will be entitled to be let in. The same general rule applies to trusts of real estate, and there will be a resulting trust for the heir. See *Tregonwell v. Sydenham*, 3 Dow. 194. *Gibbs v. Rumsey*, 2 V. & B. 294. *Jones v. Mitchell*, 1 S. & S. 290. *Dunnage v. White*, 1 Jac. & W. 583. *Ellis v. Selby*, 1 My. & Cr. 286. And the doctrine of resulting trusts is so distinctly recognised, that by the 3 & 4 Will. 4, c. 74, s. 22, a resulting trust is declared to be an estate sufficient to qualify the person entitled to it to be protector of the settlement.]

testator's other lands stood settled after the death of the said earl ; and after the decease of the earl, the annuitant, the trustees were to stand seised of the estates to the use of the first and every other son of the same earl successively in tail, with remainders over. The question was, who was entitled to the right of presentation to the advowsons during the life of the earl, the annuitant. The Lord Chancellor determined, that the trustees themselves had no pretence of right ; and that the right of presentation not having been disposed of during the life of the earl, the devisee of the annuity, it resulted to the heir.

So, in the case of the Marquess Townshend *v.* the Bishop of Norwich and others (Aug. 1821,) it appeared that the late Lord Townshend, by his will dated the 19th of July 1811, devised unto the use of trustees and their heirs all his real estates not previously by his will disposed of, in trust, by mortgage or sale to raise so much money in aid of his personal estate as would be sufficient to pay his debts and legacies, and after payment thereof, [*361] ^{*in trust to convey his real estates,} or so much thereof as should not be disposed of under the trust aforesaid, to the use of the same trustees and their heirs during the life of Lord Charles Townshend, in trust, out of the rents and profits, to pay all taxes and other outgoings, and the expense of repairs ; and then to pay an annual sum of 4000*l.* to Lord Charles Townshend, and from time to time during the term of twenty-one years, if Lord Charles should so long live, to accumulate the surplus of the said rents and profits, with remainders over after the death of Lord Charles, who was not the heir of the testator. The advowson of the rectory of Rainham was included in the residuary devise contained in the will ; and the rectory having become vacant, the question then arose as to the right of presentation, such right having been claimed, first, by the present marquis, as heir of the testator; secondly, by Lord Charles Townshend ; and, thirdly, by the trustees. The Lord Chancellor decided in favour of the present marquis, upon the ground that there was a resulting trust to him, as heir-at-law.

Within this rule may be included that class of cases where a trust is created by deed or will for a particular purpose, and there is no further declaration of the trust;⁶ as where lands are *devised to executors for payment of debts and legacies, and no further trust [*362] is declared, the executors, after the payment of debts and legacies, will be trustees as to the surplus for the heir at law,⁷ although the executors have no legacy, and the heir has an express one.⁸ So, where A. devised lands to trustees to sell, and to dispose of the money as he should appoint, and provided he left no paper of appointment, to his four nephews; A. appointed several sums to be paid to several persons, which sums did not amount to the value of the lands; and it was determined that the surplus resulted to the heir.⁹

So, where a rent-charge was devised to be sold to pay legacies to the amount of 800*l.*; but if the rent-charge sold for 1000*l.*, then an additional legacy of 100*l.* was given to B., and another of 100*l.* was given to C.: it was held in this case, that if the rent-charge sold for above 800*l.* and less than 1000*l.*, the residue above 800*l.* would result to the heir at law.¹ Upon the same principle, the case of *Digby v. Legard* was determined.² E. B. devised her real and personal *estates to trustees in trust, to sell and pay debts, and to pay the residue to five persons, to be equally divided among them, share and share alike (which words in a will create a tenancy in common); one of the residuary legatees died in the lifetime of the testatrix, and the Court decided that this was a resulting trust (as to the share in the real estate of the residuary legatee, who died in the testator's lifetime), for the benefit of the heir-at-law.

The general rule which I have mentioned, that when

⁶ See *Cooke v. Guayas*, cited 2 Vern. 645, and the cases cited in the note to *Hill v. Bishop of London*, 1 Atk. 619, last ed. In *Davidson v. Foley*, 2 Bro. C. C. 203, the trust of a term of years, created for particular purposes, resulted for the benefit of the tenant for life, in remainder expectant upon the term. See the case of *Sidney v. Miller, Cooper*, 206, where a term of years was created, and no trusts of it declared, and it was directed to attend the inheritance.

⁷ *Countess of Bristol v. Hungerford*, 2 Vern. 645.

⁸ *Starkey v. Brookes*, 1 P. W. 390.

⁹ *City of London v. Garway*, 2 Vern. 571.

¹ *Stonehouse v. Evelyn*, 3 P. W. 251.

² Note 1, 3 Cox's P. W. 22.

lands are devised for a particular purpose, viz. to be sold for payment of debts, &c. there is a resulting trust for the heir-at-law, admits, however, of several exceptions.³

*In *Hill v. Bishop of London*,⁴ Lord Hardwicke [*364] observed, that if J. S. devised lands to A. to sell them to B., for the particular advantage of B., that advantage was the only purpose to be served according to the intent of the testator; and to be satisfied by the mere act of selling, let the money go where it would; and that there was no precedent of a resulting trust in such a case; and that if A. devised lands to J. S. to sell for the best price to B., or to lease for three years, at such a fine, there could be no resulting trust to the heir of the testator. In a case⁵ where there was a devise, by a codicil, to trustees to sell, and to dispose of the money arising by the sale to such uses and for such purposes as the testator should appoint, and in default of appointment, as they (the trustees) or the major part of them, should think proper; the testator having previously devised these lands to the same trustees for such charitable uses as he should direct by codicil or otherwise; the testator made no appointment: the trustees insisted upon the beneficial interest in the lands devised, and the heir-at-law claimed a resulting trust; but it was determined that there should be no resulting trust for the heir, nor could the trustees have any beneficial

³ See note to 1 Atk. 619, 3d ed. In *Hill v. Bishop of London*, 1 Atk. 620, Lord Hardwicke observes, that "no general rule is to be laid down, unless where a real estate is devised to be sold for payment of debts, and no more is said. Then certainly it is a resulting trust; but if a particular reason occurs, why the testator should intend a beneficial interest to the devisee, there are no precedents to warrant the court to say it shall not be a beneficial interest."

In *King v. Dennison*, 1 Ves. & B. 260, 276, Lord Eldon observes, "there is a great difference here between a devise upon trust, and a devise subject to a charge." See *Southouse v. Bate*, 2 Ves. & B. 396.

Yet the word *trust* does not seem to be conclusive in converting the devisee into a trustee. See *Coningham v. Mellish*, Prec. Cha. 31. *Dawson v. Clarke*, 15 Ves. 409.

In *Gibbs v. Rumsay*, 2 Ves. & B. 294, there was a bequest of the residue of moneys arising from the sale of real estate, and the residue of personal estate, "unto my said trustees and executors (the said H. R. and J. R.)," to be disposed of unto such person or persons, and in such manner, &c., as they in their discretion should think proper and expedient; and it was held, that they had an absolute interest, and not a trust. [See also *Docksey v. Docksey*, 3 Bro. P. C. 39. *Smith v. King*, 16 East, 283. *Cook v. Hutchinson*, 1 Keen, 42.]

⁴ 1 Atk. 618.

⁵ *Cook v. Duckenfield*, Atk. 562.

*interest, for that it clearly appeared that the testator intended them no benefit, but only an authority.⁶

It has been before stated,⁷ that if there be no consideration expressed in a common law conveyance, and no declaration of the use, the use will result to the grantor. But it is here necessary to observe, that the mere want of a valuable consideration will not alone create a resulting trust in favour of the grantor, or his representatives.⁸ Lord Hardwicke, in the case of *Lloyd v. Spillet*, expressly made his decision upon this distinction between a use and a trust arising by operation of law.⁹ In fact, if the mere want of a consideration would create a resulting trust, there could be no such thing as a voluntary conveyance, so as to vest a beneficial interest in the grantee. Circumstances of fraud, mistake, or the like,¹⁰(a) may convert a grantee under a voluntary [*366] conveyance into a trustee; but not the mere want of a valuable consideration.

(4.) When a trustee or guardian¹¹ renews a lease, the new lease shall be subject to the trust affecting the old lease;¹² and if a lease be settled upon A. for life, with

⁶ To the cases which I have cited as an exemplification of the rule and its exceptions, I may add the more recent cases of *Attorney-General v. Wansey*, 15 Ves. 231. *Dawson v. Clarke*, 15 Ves. 409. *Wright v. Wright*, 16 Ves. 188. *Nash v. Smith*. 17 Ves. 29. *Sheddon v. Goodrich*, 8 Ves. 481. *Williams v. Coade*, 10 Ves. 500. *Hill v. Cock*, 1 Ves. & B. 173. *Mangham v. Mason*, Ibid. 410. *Hooper v. Goodwin*, 18 Ves. 156.

⁷ [Ante, p. 97.]

⁸ [On the contrary, if the relation of trustee and cestui que trust be actually constituted, equity will compel the execution of a voluntary trust. See post.]

⁹ *Barn. Ch. Rep.* 387, 388. 2 Atk. 150.

¹⁰ See 1 *Freem.* 305, 308. 2 Atk. 150. *Duke of Norfolk v. Browne*, Prec. Cha. 80.

¹¹ [Or a party interfering with the assets and compelling the surrender, by executors, of a leasehold interest bequeathed to minors. *Mulvany v. Dillon*, 1 Ball. & Beat. 409. So, if a mortgagee of a leasehold interest renew, he will be a trustee for the mortagor, subject to the mortgage. *Rakestraw v. Brewer*, Select Cases in Chan. 55. *Fitzgerald v. Rainsford*, 1 Ball. & Beat. 37, in note. So, if one partner renews a lease of the premises in which the partnership business is carried on in his own name clandestinely, it will be a trust for the partnership. *Featherstonhaugh v. Fenwick*, 17 Ves. 298. See also *Fawcett v. Whitehouse*, 1 Russ. & My. 132.]

¹² *Holt v. Holt*, 1 Cha. Ca. 191. *Pierson v. Shore*, 1 Atk. 480. *Abney v. Miller*, 2 Atk. 597. *Edwards v. Lewis*, 3 Atk. 538. *Featherstonhaugh v. Fen-*

(a) *German v. Gabbald*, 3 Binn. (Penns.) 302; *Haines v. O'Connor*, 10 W. (Penns.) 313; *Brown v. Dysinger*, 1 R. (Penns.) 408; *Robertson v. Robertson*, 9 W., (Penns.) 36.

remainders over, and A. obtain a renewal of the lease, the renewed lease shall be bound by the trusts of the will or settlement.⁴ So, if one of three lessees, under a lease *from a dean and chapter, surrender the old lease, and take a new lease to himself, it shall be a trust for all of them.⁵ In these cases the rule of equity is enforced, even against the express intention and contract of the lessor.⁶

It is observable that the rule has been adopted in the legislature in several statutes relating to the redemption and purchase of land-tax.⁷

wick, 17 Ves. 298. *Brookman v. Hales*, 2 Ves. & B. 45. *Milner v. Harewood*, 18 Ves. 259, 274. [Webb v. Lugar, 2 Yo. & Col. 247. *Griffin v. Griffin*, 1 Sch. & Lef. 352. And to such a length has the doctrine been carried, that where a trustee procured a new lease where it was perfectly clear that the lessor would never have renewed for the benefit of the cestui que trust, the rule was still adhered to, that the trustee must hold it for the cestui que trust. Per Lord Eldon in *Fitzgibbon v. Scanlan*, 1 Dow, 269.]

⁴ *Taster v. Marrott*, Amb. 668. *Raw v. Chichester*, Ibid. 715. *Owen v. Williams*, Ibid. 734. *Pickering v. Vowles*, 1 Bro. 197. *Coppin v. Fernyhough*, 2 Bro. 291. *Killick v. Flexney*, 4 Bro. 161. *James v. Dean*, 11 Ves. 383. 15 Ves. 236. [Eyre v. Dolphin, 2 Ball. & Beat. 290. *Bowles v. Stewart*, 1 Sch. & Lef. 209. And if an underlessee, who has only a life estate in his lease, instead of taking a renewed lease, purchases the interest of an immeiate lessor, and obtains from the superior lessor a renewal of the lease which he has so purchased, the lease so renewed will be subject to the same trusts as would have affected the underlease if it had not been merged, or had not expired; and the same rule holds, although the renewed lease comprehends other property in addition to the premises previously devised. *Giddings v. Giddings*, 3 Russ. 241.]

⁵ *Palmer v. Young*, 1 Vern. 276. In this case it should seem that the surrender of one joint tenant was considered as binding against the others. But this is at least doubtful. In *Reed v. Tucker*, Cro. Eliz. 302, it is said, "that every act by one joint tenant for the benefit of his companion, shall bind; but those acts which prejudice his companion in estate, shall not bind—as the *surrender* of the one."

⁶ *Keech v. Sandford*, Sel. Ca. Cha. 61. Whether the principle is extended in equity to the purchase of the reversion in fee expectant on the lease, see *Randall v. Russell*, 3 Mer. 190. *Hardman v. Johnson*, Ibid. 347. *Norris v. Le Neve*, 3 Atk. 26. [3 Russ. 258.] [For later cases where the renewed lease has been held subject to the trusts affecting the old lease, see *Jackson v. Welsh*, 1 Lloyd & G. temp. Plunkett, 346. *Buckley v. Lanauze*, Ibid. 327. *Webb v. Lugar*, 2 Yo. & Coll. 247. *Fitzroy v. Howard*, 3 Russ. 225. *Fosbrooke v. Balguy*, 1 My. & Ke. 226.]

⁷ See 39 Geo. 3, c. 108, sec. 8; 42 Geo. 3, c. 116. By the 85th section of the latter, it is enacted, "that where the reversion of any manors, messuages, lands, tenements, or other hereditaments holden under any body politic or corporate, or company; or any feoffees or trustees for charitable or other public purposes, by virtue of any lease for one or more life or lives, or for years absolute or determinable on the dropping of one or more life or lives, or by copy of court-roll or customary tenure for life or lives, shall be purchased under the powers of this act, by or with the proper moneys of the person or persons for the time being, beneficially entitled to the rents and profits thereof, and where such lease or leases shall be subject to any will or settlement, so that such person or persons shall not, at the time of purchasing the said reversion thereof, be entitled to the absolute interest under such lease or leases, and such person or persons shall be

*But if there be a guardian or trustee for an infant, to whom lands are descended or devised, but the title is really in a third person, and the *trustee or guardian buy in the title of the third person, this shall not be taken to be a trust for the infant; for such trustee or guardian is at liberty to purchase it as well as any other *person;³ and in

bound by any covenant, engagement, or condition, to renew the lease at the accustomed periods, with his, her, or their own moneys, or with or out of the rents and profits of the estate, then, and in every such case, the immediate estates and interests under such subsisting lease or leases, as well as the reversion expectant thereon, shall, under the direction of the said last-mentioned commissioners, be charged with and made subject to the repayment of the principal money advanced for the purchase of such reversion, with lawful interest, to or for the benefit of the person or persons advancing the same, his, her, or their executors, administrators, or assigns: but if the person or persons so, for the time being, beneficially entitled to the rents and profits of the estates comprised in such subsisting lease or leases as aforesaid, shall not be liable to any covenant, engagement, or condition, to renew the lease at the accustomed periods, with his or her own moneys, or with or out of the rents and profits of the estate, then, and in such case, the reversion only expectant on the subsisting lease or leases shall, under such direction as aforesaid, be charged and made subject for the benefit of such person or persons, with the payment of the principal money advanced for the purchase thereof, together with lawful interest, to accumulate from the time of such purchase till the expiration of the subsisting lease, after deducting out of such interest the annual rent (if any) which shall be payable during the lease, and which shall have been purchased with reversion, unless the person or persons advancing such money shall be desirous that the same, together with the interest, may be made a charge on the subsisting lease or leases; in which case the immediate estates and interests under the same, as well as the reversion expectant thereon, shall be charged and made subject to the payment of such principal money and interest, in like manner as if such person or persons had been bound to renew the lease; and subject to such charges, so to be made respectively as aforesaid, the fee-simple of such manors, messuages, lands, tenements, or other hereditaments, shall be settled, under the like direction, for the benefit of the person or persons so purchasing the same, and of such other persons as would have been entitled under such will or settlement to the benefit of any renewed lease or leases for the time being, and so as to be enjoyed by them for such respective estates and interests, as, considering the alteration of the tenure, shall appear to the said commissioners most correspondent with the intention of such will or settlement: provided always, that where the immediate estates or interests, under any such lease or leases, shall be charged with and made subject to the payment of the principal money advanced for the purchase of the reversion, the persons successively entitled to the rents and profits of the manors, messuages, lands, tenements, and hereditaments, comprised in the subsisting lease or leases respectively, shall be made chargeable with the interest accruing during his or her estate therein: and that no greater arrear than for one year shall be recoverable against any person who shall become entitled in remainder for interest accrued during the estate or term of any person or persons entitled to any preceding estate or interest in the premises: provided also, that it shall be lawful for the said commissioners to direct an application to be made to the Court of Chancery in a summary way, for obtaining direction as to the mode of settling any such reversion, or the equity of redemption thereof, where the case shall appear to them to be attended with difficulty."

³ Lesley's case, 2 Freem. 52.

O'Herlihy *v.* Hodges,¹ Lord Redesdale has observed, "That the rule is established, in order to keep trustees in the line of their duty, but not for the purpose of being an injury to a third person, if the principal injury be to him."¹

VIII. I shall now explain the system of trusts, as it more immediately refers to the person and acts of *cestui que trust*.

(1.) Any person who is capable of taking the legal estate directly and immediately to himself, may acquire the equitable or beneficial interest in the same estate.²

But it is proper to observe in this place, that in case of a trust created by a mere volunteer, not grounded on a meritorious consideration, it is necessary to vest the legal estate in a trustee; for the Court of Chancery will not compel the performance of a contract or agreement in favour of a mere volunteer.³ In *Ellison v. Ellison*,

¹ Schoales & Lefroy, 123.

¹ [And see *Nesbitt v. Tredennick*, 1 B. & B. 29; and *Fitzgerald v. Rainsford*, *ibid.* 37, note.]

² See before 89. Note, the king may be *cestui que trust*, *Middleton v. Spicer*, 1 Bro. C. C. 201; but an alien cannot, 3 Cha. Rep. 35. [See before, 308, note.] I apprehend that a corporation cannot take as *cestui que trust* without a licence in mortmain.

³ See *Collman v. Sarrell*, 1 Ves. jun. 50. [*Ellison v. Ellison*, 6 Ves. 656. *Ex parte Pye*, 18 Ves. 140. *Antrobus v. Smith*, 12 Ves. 39. *Sloane v. Cadogan*, Sugd. Ven. & Pur. vol. iii. p. 297, 10th ed. *Fortescue v. Barnett*, 3 Mylne & Keen, 36. *Edwards v. Jones*, 1 Mylne & Craig, 226. *Godsal v. Webb*, 2 Keen, 99. *Collinson v. Patrick*, *ibid.* 123. *McFadden v. Jenkins*, 1 Hare, 458. 1 Phil. 153. *Meek v. Kettlewell*, 1 Hare, 464. *Hughes v. Stubbs*, *ib.* 476. *Dillon v. Coppin*, 4 My. & Cr. 647. The question in such cases is, whether the relation of trustee and *cestui que trust* has been established or not; and in order to establish the relation, the party seeking to create the trust must have left nothing incomplete for carrying his intention into effect. Thus, in case a party intends to constitute himself a trustee, a mere declaration of trust may be sufficient. 18 Ves. 150. *Wheatley v. Purr*, 1 Keen, 551. But if the intention be to constitute other parties trustees, the legal estate or interest must (at all events if vested in the creator of the trust himself) be effectually transferred to those parties; otherwise the trust will fail. *Jefferys v. Jefferys*, 1 Cr. & Phil. 138. On the question how far a legal *chose en action*, or a mere equitable interest, can be made the subject of a voluntary settlement, see *Sloan v. Cadogan*, *Fortescue v. Barnett*, *Edwards v. Jones*, *Godsal v. Webb*, *Collinson v. Patrick*, *ubi supra*. It seems from the last-mentioned case, that the court will consider an instrument purporting to be an assignment of a legal *chose en action*, although without consideration, where the legal right is in the assignor, as equivalent to an actual transfer of a legal interest. It also appears, that an equitable interest, or *chose en action*, may be made the subject of a voluntary gift or settlement, provided the party in whom the legal interest is vested accepts the trusts, and acts upon the deed by which they are declared. See *Rycroft v. Christy*, 3 Beav. 238. *Meek v. Kettlewell*, 1 Hare, 471. But it seems doubtful whether the voluntary deed with notice to the trustee would alone be sufficient, the trustee remaining passive. It would, however, be strange if the trust were to be considered as

6 Ves. 656, 662, *Lord Eldon says, "I take the distinction to be, that if you want the assistance of the Court to constitute you *cestui que trust*, and the instrument is voluntary, you shall not have *that assistance for the purpose of constituting you

immature until perfected by some course of conduct to be adopted by a bare trustee, and which he might adopt or not, according to his discretion or caprice; for then the validity of the gift or settlement would rest with a party who is in general regarded as a mere instrument for carrying the intentions of those beneficially interested into effect. In those cases, at all events, in which the party in whom the legal interest is vested, cannot act upon the trusts at the time of their creation, as where the subject of the gift or settlement is a reversionary interest, why should not an assignment or declaration of trust, accompanied with notice to the trustee from the settlor himself, be regarded as a perfect gift, for the same reason that a party is held to constitute himself a trustee by a simple declaration of trust, the settlor having done everything in his power to carry his avowed intention into effect? The legal estate or interest in both cases remains where it was before the creation of the trust; and it is surely as reasonable to hold that the trust does not require an actual transfer of the legal interest because the settlor has no power to make or procure such transfer, as because being able, he does not chose, to do it. See *Meek v. Kettlewell*; an appeal from the decision in which case is now pending before the Lord Chancellor.

Upon the question, whether a meritorious consideration, such as making a provision for a child, will constitute a good ground for enforcing a voluntary agreement, under any circumstances where the agreement would not have been enforced without such a consideration, see *Ellis v. Nimmo*, 1 Lloyd & Goold, 333. *Holloway v. Headington*, 8 Sim. 324. *Jefferys v. Jefferys*, 1 Cr. & Phil. 138. *Meek v. Kettlewell*, *ubi supra*. The weight of authority is opposed to any such distinction; indeed the case of *Ellis v. Nimmo* appears to have been expressly overruled by the decisions in *Jefferys v. Jefferys*, and in *Dillon v. Coppin*, there cited, and 4 My. & Cr. 647.

In *Garrard v. Lord Lauderdale*, 3 Sim. 1, 2 Russ. & My. 451, it was held that a voluntary conveyance by a debtor to trustees for payment of scheduled creditors who did not execute the deed or conform to its terms, could not be enforced by the creditors. See also *Walwyn v. Coutts*, 3 Sim. 14; *Acton v. Woodgate*, 2 My. & Ke. 492; *Ravenshaw v. Hollier*, 7 Sim. 3. Such a conveyance, however, does not stand upon the same footing as what is called a voluntary settlement, with reference to the circumstances under which the trusts declared by the instrument will be held to have been perfectly constituted. If the creditors themselves are not parties to the conveyance, then, as being a voluntary provision for claims which might be otherwise legally enforced, it must be considered as made for the individual convenience and relief of the debtor himself. See *Bill v. Cureton*, 2 My. & Ke. 503. *Gibcs v. Glamis*, 11 Sim. 591. In *Bill v. Cureton*, the Master of the Rolls (Sir C. Pepys) observes, "These two cases," (*Garrard v. Lord Lauderdale*, and *Walwyn v. Coutts*), "so far from deciding that a *cestui que trust* becoming entitled under a voluntary settlement had not a good title against the settlor, proceeded upon this, that the character of trustee and *cestui que trust* never existed between the creditor and the trustees of the trust deeds, but that the settlor himself was the only *cestui que trust*, and therefore that he was entitled to direct the application of his own trust-fund. . . . A man who, without any communication with his creditors, puts property into the hands of trustees for the purpose of paying his debts, proposes only a benefit to himself by the payment of his debts; his object is not to benefit his creditors."

It has been decided that a voluntary settlement of personal property made by a person not indebted at the time, is good against a subsequent purchaser for valuable consideration. *Jones v. Croucher*, 1 Sim. & Stu. 315.]

cestui que trust; as upon a covenant to transfer stock, &c. if it rests in covenant, and is purely voluntary, this [*373] court will not execute that voluntary *covenant; but if the party has completely transferred stock, &c., though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by the Court."⁴

[*374] *It may be a question what degree of relationship is necessary to constitute a foundation for raising a meritorious consideration sufficient to support a voluntary equitable transfer of the above description? Whether it is to be confined, as in the case of supplying surrenders of copyhold property, to the moral obligation of providing for a wife or child, or whether it is to be extended, as in the case of a covenant to stand seised to uses, to the consideration of blood generally, has not been ascertained by any judicial decision that I am aware of.⁵ In *Edwards v. Countess of Warwick*, 2 P. W. 176, Lord Macclesfield says, "I take it to be clear, that if I voluntarily, and without any consideration, covenant to lay out money in the purchase of land to be settled on me and my heirs, this Court will compel the execution of such contract, though merely voluntary; for in all cases where it is a measuring cast between an *executor* and an *heir*, the latter shall in equity have the preference."

[*375] *(2.) *Cestui que trust* may bring his bill in Chancery against his trustee for breach of trust or to account;⁶ but he has no remedy against him at law.⁷ Neither can *cestui que trust* recover upon his

⁴ See *Randall v. Randall*, 2 P. W. 264. *Fursaere v. Robinson*, cited 2 P. W. 468. See also 2 P. W. 176 and 248.

⁵ [See the late case of *Ellis v. Nimmo*, in Ireland, before Lord Chancellor Sugden, 1 Lloyd & Goold, 333, where this subject is entered into at considerable length. In that case a post-nuptial agreement to make provision for a child was decreed to be specifically executed, as being founded on a meritorious consideration.]

But in the case of *Jefferys v. Jefferys*, 1 Or. & Phil. 139, overruling the case of *Ellis v. Nimmo*, it was expressly decided that a surrender of copyholds would not be supplied in the case of a voluntary settlement, even in favour of children; and the existence of what is called a meritorious consideration, was not held to constitute any exception to the principle on which the court withholds its assistance from a volunteer.]

⁶ See *Digby v. Cornwallis*, 3 Cha. Rep. 72. *Pollard v. Downes*, 2 Cha. Ca. 121.

⁷ *Sturt v. Mellish*, 2 Atk. 612. *Contra*, 1 Eq. Ab. 384. (D.) note (a.) In Bur-

equitable title in the courts of law as against a third person;³ but it is necessary, in order to support or obtain his rights, that he should sue in the name of his trustees.⁴ Yet it is said, that a tender to cestui que trust of money due upon bond, and a refusal, is a good plea to an action of debt upon the bond by his trustee.¹

(3.) By the statute 7 Will. 3, c. 25, s. 7, it is enacted that no person shall be allowed to have any vote in election of members to serve in parliament for or by reason of any trust estate or mortgage, unless such trustee or mortgagee be in actual possession, or receipt of the rents and *profits of the same estate; but that the [*376] mortgagor, or cestui que trust in possession, shall and may vote for the same, notwithstanding such mortgage or trust.²

(4.) In the case of Packer and Wyndham,³ it is said that every disposition of cestui que trust is binding upon the trustee in a court of equity, and even at law. But although the conveyance of cestui que trust is conclusive upon the trustee to the extent of the beneficial interest

kett v. Randall, 3 Mer. 466, an issue was directed, "whether the testator J. S. was, at his death, *beneficially* entitled to the premises in question."

¹ *Doe v. Staples*, 2 Term Rep. 684. *Barnes v. Crow*, 4 Bro. C. O. 2. Whether courts of law will, upon an action for a deposit, as between vendor and purchaser, enter into equitable objections to a title, see *Sugd. Vend. & Pur.* [*Maberly v. Robins*, 5 Taunt. 625. *Curling v. Shuttleworth*, 6 Bing. 121. *Boyman v. Gutch*, 7 Bing. 379.]

² *Ex parte Coysegame*, 1 Atk. 192.

³ *Lynch v. Clemence*, Lutw. 179, ed. 1718. See the cases collected in note to pl. 2. 18 Vin. 303, as to the effect of a release by cestui que trust claiming under a bond or covenant.

² [So by the Reform Act, 2 Will. 4, c. 45, s. 23, it is enacted, "That no person shall be allowed to have any vote in the election of a knight or knights of the shire, for or by reason of any trust estate or mortgage, unless such trustee or mortgagee be in actual possession or receipt of the rents and profits of the same estate, but that the mortgagor or cestui que trust in possession shall and may vote for the same estate notwithstanding such mortgage or trust." The above clause, it will be observed, relates only to the election of knights of the shire; the right of voting for boroughs is expressly limited to the *occupiers* of houses, &c. of a certain value, duly rated to the poor-rate; and no distinction is made between trustee or cestui que trust.

A cestui que trust also, having the requisite property, is qualified to sit as a member of the House of Commons; the statute 9 Anne, c. 5, including estates in equity.

So he is entitled to vote for a coroner, 58 Geo. 3, c. 95, s. 2.

So he is qualified as a juror, 8 Geo. 4, c. 50, s. 1.

So before the late act 1 & 2 Will. 4, c. 32, which repeals all the former statutes, and renders a qualification unnecessary, he was qualified to sport under the Game Laws. *Wetherell v. Hall*, Caldecott, 230.]

³ Prec. Cha. 415.

conveyed, yet a trust is not alienable by the rules of the common law; and I have, in a preceding part of this [*377] work, attempted to show that *cestui que trust* *cannot convey the legal estate by virtue of the statute 1 Rich. 3.

(4, a.) In the transfer of equitable rights, it is usual in practice to adopt the species of conveyance applicable to the assurance of the legal estate; as if a person be seised of the equitable estate in fee-simple, he usually conveys it by lease and release, or bargain and sale enrolled. But this is never absolutely necessary;⁴ and in case an equitable interest is sold, it is clear that the mere payment of the purchase-money would operate as a transfer of it.⁵

[*378] *(4, b.) But when the owner of an equitable interest cannot, if such equitable interest were converted into a legal estate, convey it without the aid of a fine or recovery, it will be necessary for him to use the same kind of assurance by matter of record in the transfer of his beneficial interest, as if it had been a legal estate; and therefore the equitable rights of tenants in tail and married women must be conveyed by fine or recovery.⁶

As to tenants in tail, it has been said that if the trus-

⁴ [Smith v. Frederick, 1 Russ. 198, 199. For some observations as to the doctrine of fictitious forms of conveyance, see Wood v. Lambirth, 1 Phil. 16.]

⁵ [The assignment of an equitable interest in personal estate, even for valuable consideration, is not alone sufficient to constitute the party in whom the legal right is vested a trustee for the assignee in all events: as against a subsequent assignee for valuable consideration, notice to the trustee is necessary to perfect the relation of trustee and *cestui que trust*. Dearle v. Hall, Loveridge v. Cooper, 3 Russ. 1. Hulton v. Sandys, 1 You. 602. Foster v. Blackstone, 1 My. & Keen, 297. Greening v. Beckford, 5 Sim. 195. Cumming v. Prescott, 2 You. & Coll. 488. Timson v. Ramsbottom, 2 Keen, 35. Where there are several trustees, notice to one will be sufficient. Smith v. Smith, 2 Cro. & Mee. 231. Meux v. Bell, 1 Hare, 73. But in the case of real estate, conveyances of an equitable interest are construed and treated in a court of equity in the same manner as conveyances of the legal estate are construed and treated at law; and, consequently, notice to the party in whom the legal estate is vested, is not necessary to complete the title under a conveyance of the equitable interest. Jones v. Jones, 8 Sim. 633. And even in the case of personal estate, the rule with respect to notice does not apply as between the parties themselves. Cook v. Black, 1 Hare, 390.]

⁶ [But an equitable recovery is valid, though the tenant to the *præcipe* is made by bargain and sale not enrolled within due time. Smith v. Frederick, supra.

The form of conveyance substituted by the act for the abolition of fines and recoveries, 3 & 4 Will. 4, c. 74, is applicable to equitable as well as legal estates.]

tee, having the legal estate, joins with his *cestui que* trust in making a feoffment with livery, it will destroy the equitable entail.⁷ But this case cannot be relied upon. If the equitable *tenant in tail has the immediate [**379] reversion in fee, he may acquire the equitable fee-simple by a fine; but if there are equitable remainders expectant upon his estate tail, it will be necessary for him to suffer a recovery.⁸ But where there is an equitable estate tail attached to, or arising from, a legal estate of the same extent, with *legal* remainders, an equitable recovery will not bar the legal remainders.⁹ The rule may be generally stated, that where the tenant, against whom the writ in a common recovery is brought, has only an equitable estate of freehold, the recovery suffered upon that equitable freehold, cannot bar a legal estate tail vested in the vouchee, or any legal remainder. But the converse is not true; for if a legal, as well as beneficial, estate of freehold is conveyed to the tenant to the writ the recovery will bar an equitable estate tail in the vouchee, and all equitable remainders expectant upon it.¹

*When a married woman is entitled to an equitable freehold interest, not settled to her separate use, it is necessary that she should concur with her husband in levying a fine, in order to pass it;² but when personal property is settled to the separate use of a *feme*

⁷ Bowater v. Elly, 2 Vern. 344. Indeed it has been said, that a common bargain and sale by *cestui que* trust, is alone sufficient to bar the entail. 1 Vern. 440. 2 Vern. 133. But that opinion has been overruled. 1 P. W. 91. 1 Ves. 260. Legate v. Sewell, 2 Vern. 552. Kirkham v. Smith, Amb. 518. With respect to copyhold lands, where there is no particular custom to bar the entail of the legal estate, it seems that a mere devise by *cestui que* trust is sufficient to bar the entail of the trust. See Otway v. Hudson, 2 Vern. 583, and Mr. Cox's note to Dunn v. Green, 3 P. W. 10.

⁸ North v. Champernoon, 2 Cha. Ca. 63, 78. 1 Vern. 13, S. C. 1 P. W. 91, S. C. Carpenter v. Carpenter, 1 Vern. 440. Beverley v. Beverley, 2 Vern. 131. Boteler v. Allington, 1 Bro. Cha. Ca. 72.

⁹ Robinson v. Cuming, 1 Atk. 473. Salvin v. Thornton, 1 Bro. Cha. Ca. 73, in note. Amb. 546, 699, S. C. Shapland v. Smith, 1 Bro. Cha. Ca. 74.

¹ See Philipps v. Brydges, 3 Ves. 120, 128. Goodrich v. Brown, 2 Freem. 180. 1 Cha. Ca. 49. It has recently been determined, that where an equitable tenant in tail conveys to a mortgagee in fee, and afterwards suffers a recovery, it is not necessary that the mortgagee should concur in making the tenant to the *præcipe*. Nouaille v. Greenwood, Turner's Cha. Rep. 26.

² [In every case of a disposition by a married woman under the act for the abolition of fines and recoveries, 3 & 4 Will. 4, c. 74, whether the estate be legal or equitable, her husband must concur in the deed by which the disposition is made: s. 77.]

covert, she is, generally speaking, entitled to dispose of it in the same manner as if she were a *feme sole*, although there be no express power of disposition reserved to her.³ But where an annuity, or annual income, is settled to the separate use of a married woman, she may be restrained from appointing the unaccrued payments of it.⁴

³ In *Peacock v. Monk*, 2 Ves. 191, Lord Hardwicke says, "That as to personal estate, undoubtedly where there is an agreement between husband and wife before marriage that the wife shall have to her separate use, either the whole or particular parts, she may dispose of it by an act in her life, or by will; she may do it by either, though nothing is said of the manner of disposing of it." See *Wagstaff v. Smith*, 9 Ves. 520. *Sturgis v. Corp*, 13 Ves. 190. *Heatley v. Thomas*, 15 Ves. 596. [Major *v. Lansley*, 2 Russ. & My. 355. That even the general engagement of a married woman will be enforced in equity against her separate property, see *Murray v. Barlee*, 3 My. & Keen, 209. *Stead v. Nelson*, 2 Beav. 245. *Owens v. Dickenson*, 1 Cr. & Phil. 48.]

⁴ Per Lord Chancellor in *Fybus v. Smith*, 2 Bro. Cha. Ca. 347. *Jackson v. Hobhouse*, 2 Mer. 483. See *Mores v. Huish*, 5 Ves. 694. But otherwise in the case of a male. *Brandon v. Robinson*, 18 Ves. 429. [And it is otherwise also in the case of a *feme sole*, although she be expressly restrained by the words of the gift from alienation. *Woodmeston v. Walker*, 2 Russ. & My. 197; *Jones v. Salter*, ib. 208; *Brown v. Pocock*, ib. 210; *Massey v. Parker*, 2 My. & Keen, 174. Indeed the restrictive clause, or fetter (as it has been called), by which a woman is prevented from anticipating the unaccrued payments of her annual income is considered as merely effecting a modification of her separate estate, and consequently to have its operation only during coverture. "When this court first established the separate estate, it violated the laws of property as between husband and wife; but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy separate estate as a *feme sole*, the laws of property attached to this new estate; and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and by another violation of the laws of property, supported the validity of the prohibition against alienation." 4 My. & Cr. 405. "The separate estate may, and often does, exist without the restriction, but the restriction has no independent existence: when found, it is a modification of the separate estate, and inseparable from it." 1 Beav. 33. It follows, that the restriction, when annexed to a trust for the separate use of a woman, is valid, wherever the trust itself is valid.]

The validity of this trust, when created for a single woman, and not (as by ante-nuptial settlement) in contemplation of an immediate marriage, has undergone much discussion in some recent cases; and it is now settled, that the trust may be operative for any coverture, (and the reason applies to any number of successive covertures,) subsequent to the creation of the trust. *Tullett v. Armstrong*, 1 Beav. 1; 4 My. & Cr. 390, S. C. Previously to this case, Lord Chancellor Cottenham had, in the case of *Massey v. Parker*, decided by him when Master of the Rolls, expressed an opinion, that where a trust for the separate use of a single woman had been created, with the object of excluding a future husband, as the interest of the woman was absolute *before* marriage, it would become her husband's by the act of marriage. But in the case of *Tullett v. Armstrong*, after a full examination of the authorities on this subject, he came to the conclusion (adopting the view which had been taken by the present Master of the Rolls in the same case) that the court would extend its jurisdiction, by which the separate estate was first established, to the protection of that estate, with the qualifications and restrictions attached to it, throughout a subsequent coverture. When, however, it is said that the trust, with or without a clause restraining anticipation, will be valid in the case of a subsequent marriage, it

*There is a difference as to real property. In the anonymous case, 2 Ves. 192, it is said, that as to real estate, there must be an express power of appointment, in order to enable a feme covert to

must be recollect that the woman, whilst she remains single, has the same power of disposition as if nothing in exclusion of the marital control, or in restraint of anticipation, were annexed to the trust. And of course the trust for separate use may be confined by the terms of the instrument creating it to any one particular coverture.

In the case of *Brown v. Bamford*, 11 Simon, 127, where there was a direction by will to pay the annual income of certain property to such person or persons, for such intents and purposes, and in such manner as S. B. (a married woman) by any writing under her hand, when and as the same should become due, but not by way of assignment, charge, or other anticipation thereof, should appoint, and in default of appointment, into her proper hands for her sole and separate use, independent of any husband, for which purpose the testator directed that the receipts in writing under the hand of S. A. should be good discharges for such annual income, the Vice-Chancellor (Shadwell) held, that under the direction to pay the annual income into the proper hands of S. B., she might make a sweeping disposition of her life interest, on the ground that this direction created a trust distinct from the power of appointment given in the preceding part of the clause, and that the express restraint on anticipation was confined to an exercise of the power. It is clear that by thus regarding the provision for the married woman not as entire, but consisting of distinct parts, one of which is in effect contradicted by the other, the intention of the party making the provision is defeated. For though by a rigid and technical construction, the trust to pay into the proper hands of the married woman may be separated from the clause restraining anticipation, yet the power of alienation which would follow is a mere consequence of law, and inconsistent with the express declaration that no disposition should be made by way of assignment, or other anticipation. The testator could not have contemplated that a power of disposition which he had declared should not exist, would follow from a mere direction to pay the annual income into the proper hands of the party, and to her receipts; and the question is entirely one of intention. *Pybus v. Smith*, 3 Bro. C. C. 347. When it is considered that "a feme covert, with separate estate, not protected by a clause against anticipation, is in most cases in a less secure situation than if the property had been held for her simply upon trust," (4 My. & Cr. 393,) it must be admitted that the case of *Brown v. Bamford* is a singular instance of an astute construction adopted by a court of equity for the purpose of defeating the object of a provision which is the very creature of its own jurisdiction.

The Vice-Chancellor, in the case referred to, suggests, that in order to prevent anticipation, it should be declared that the receipts of the married woman, and no other receipts, should be sufficient discharges. But it is doubtful whether these additional words would have the desired effect. In the case of *Acton v. White*, 1 Sim. & Stu. 429, it was held that negative expressions, similar to those suggested in *Brown v. Bamford*, would not disable the woman from making a sweeping disposition of her life interest. See also *Sturgis v. Corp*, 13 Ves. 190. *Browne v. Like*, 14 Ves. 302. *Glyn v. Baster*, 1 You. & Jer. 329. Indeed the decision in question leads to this result; that in the usual trust for separate use, the clause restraining anticipation contained in the first part of the provision, should have been repeated in the latter,—that is, the settlor or testator should have declared his intention twice over. But this is by no means a solitary example of an attempt at extreme accuracy and precision, having led, by diffuseness, to uncertainty, and thus rendered necessary a still further accumulation of words. Of course a trust for separate use without power of anticipation, may be created by a simple declaration to that effect. (An appeal from the decision of the Vice-Chancellor in the case of *Brown v. Bamford* is now pending before the Lord Chancellor.)]

[*383] *devise or convey it; but as to personal estate, the separate property of the wife, it is incident to it, that she may make a will or appointment of it.

[*384] *It has since been held,⁵ that where a real estate is settled to the separate use of a married woman during her life, she may, without any express power of appointment for that purpose, convey her equitable estate for life by deed, without the aid of a fine. I apprehend however, that when an estate in fee-simple is conveyed for the separate use of a married woman, without an express power of appointment reserved to her, she cannot, during her coverture, dispose of the fee-simple without concurring with her husband in levying a fine.⁶

It may be proper here to observe, that when stock was settled upon a *feme covert* for life for her separate use, and after her death upon such trusts as she should, either covert or sole, by *will* appoint, and for want of appointment, in trust for her executors and administrators for their own use and benefit, it was determined that the wife could not, during coverture, dispose of the stock by *deed*; and the Master of the Rolls observed, that the restriction was only during the wife's then coverture.⁷

[*385] *In *Anderson v. Dawson*, 15 Ves. 532, personal estate was settled upon a *feme covert* for life, for her separate use, and, after her decease, upon such trusts as she should by will appoint, and for want of appointment, in trust for her next of kin, their executors, administrators, and assigns, according to the statute for the distribution of intestates' effects; and it was decided that the claims of the next of kin could only be defeated by a due exercise of the power of appointment.⁸

It seems, that where money is directed to be laid out in the purchase of land to be settled upon a *feme covert*,

⁵ *Burnaby v. Griffin*, 3 Ves. 286. [*Major v. Lansley*, 2 Russ. & My. 355.]

⁶ [And a trust to pay the rents to the separate use of a married woman, will not exclude the husband's title as tenant by the curtesy, (*Morgan v. Morgan*, 5 Mad. 408); though it seems that an express direction that the husband shall not be entitled to take by the curtesy, will be effectual as to the equitable estates of the wife. *Bennet v. Davis*, 2 P. Wms. 316. 5 Mad. 411.]

⁷ *Sockett v. Wray*, 4 Bro. Cha. Ca. 483.

⁸ See *Heatley v. Thomas*, 15 Ves. 596. [*Lee v. Muggeridge*, 1 Ves. & B. 118. *Wilson v. Mount*, 2 Sim. & Stu. 493. *Godsal v. Webb*, 2 Keen, 99.]

either in fee simple or in tail, with the immediate reversion in fee to herself, she may, by an application to the Court of Chancery, and upon being solely and separately examined by analogy to the form of a fine at law, obtain the payment of the money;⁹ although it [*386] *should seem that where a feme covert is entitled to the interest of personal estate for life, and not settled to her separate use, the court will not upon examination allow her to part with her life interest.¹

When personal estate is settled for the separate use of the wife for life, and if she survive her husband, then upon her absolutely; and if she die in the lifetime of her husband, then upon such trusts as she shall by deed or will appoint, and for want of such appointment, upon her executors and administrators: or, if it be settled to the separate use of the wife for life, and if the husband survive the wife, then upon him absolutely; but if she survive the husband, then upon herself absolutely; in neither case will the court, upon the application and examination of the wife during coverture, allow the settled property to be transferred.²

*It is sometimes a question what words will [*387] create a trust for the separate use of a *feme covert*. In *Tyrrell v. Hope*, 2 Atk. 561, the Master of the Rolls

⁹ *Oldham v. Hughes*, 2 Atk. 452. *Pearson v. Brereton*, 3 Atk. 71. *Cunningham v. Moody*, 1 Ves. 176. *Binford v. Bawden*, 1 Ves. J. 512. [See 7 Geo. 4, c. 45, repealed by stat. 3 & 4 Will. 4, c. 74 (the act for the abolition of fines and recoveries), s. 70. By this latter act, money subject to be invested in the purchase of lands to be entailed, whether the tenant in tail be a feme covert or not, may be dealt with in the same way as the lands themselves might have been under the act if actually purchased and settled, s. 71; and by s. 77, a married woman may in every case, except that of being tenant in tail, dispose of money subject to be invested in the purchase of lands as effectually as if she were a feme sole, provided her husband concur, and the deed of disposition be acknowledged by her. A disposition being made under this act by a married woman of a fund in court, the court would order payment of the money on the production of the deed enrolled, or of an affidavit of the enrolment, (*In re Smythe*, 3 My. & Keen. 249); and no further separate examination of the woman would of course be necessary.]

¹ *Fraser v. Baillie*, 1 Bro. Cha. Ca. 518. [It seems that, consistently with the doctrine established in *Purdew v. Jackson*, 1 Russ. 1, and *Honner v. Morton*, 3 Russ. 65, an effectual disposition of the entire life interest of the wife could not be made in this case. See *Stiffe v. Everitt*, 1 My. & Cr. 37.]

² *Richards v. Chambers*, 10 Ves. 580. See *Lee v. Muggeridge*, 1 Ves. & B. 118. [With respect to a contingent reversionary interest of a *feme covert* in the trust of a term for years, see *Donne v. Hart*, 2 Russ. & My. 360; and as to the case of a feme covert entitled to a share of the proceeds to arise from the sale of real estates vested in trustees for sale, see *May v. Roper*, 4 Sim. 360.]

observed, that the word *enjoy* was very strong to imply a separate use to the wife. A direction to pay rents or interest "into the hands of the testator's daughter, for her own use and benefit,"³ and a direction, "that trustees should not be troubled to see to the application of any sum or sums paid to Ann Hill and Sophia Lee, but their receipts in writing respectively shall be a sufficient discharge to my said trustees,"⁴ have been considered sufficient to create a trust for the separate use of a *feme covert*; but it has been lately determined, that the words "*for her own use and benefit*," will not have that effect.⁵ (a)

[*388] *^(4, c.) It has been decided that a fine or other alienation by *cestui que trust* for life, will not operate as a forfeiture of his trust estate,⁶ nor will such fine, or other conveyance by him, destroy any contingent remainders expectant upon his life estate.⁷

IX. It remains to consider the trustee, and the nature of his estate and office.

(1.) The modern doctrine of trusts differ perhaps in no instance so essentially from the system of uses, as in the construction of courts of equity, upon the capacity or liability of persons to act as trustees.

Formerly, we have seen, that the intention of the parties has been frequently frustrated by the rigid adherence of the Court of Chancery to the technical scruples

³ Hartley v. Hurle, 5 Ves. 540.

⁴ Lee v. Pridgeaux, 3 Br. Cha. Ca. 381.

⁵ Wells v. Sayers, 4 Mad. 409. Roberts v. Spicer, 5 Mad. 491. But see Jones v. ——, cited 5 Ves. 520, and Kirk v. Paulin, 7 Vin. 95. [Nor will a direction to pay the shares of two married women "into their own proper and respective hands to and for their own use and benefit." Tyler v. Lake, 2 Russ. & My. 183. See also Stanton v. Hall, ibid. 175, and Massey v. Parker, 2 My. & K. 181. Blacklow v. Laws, 2 Hare, 49. The principle seems to be, that the husband is not to be excluded except by expressions that leave no doubt of the intention.]

In Margetts v. Barringer, 7 Sim. 482, property was given to two females, one of whom was married and the other not, "to be equally divided between them, share and share alike, for their own use and benefit, independent of any other person." Under the latter words, the Vice-Chancellor held that the husband was excluded.

Where it is doubtful whether property is effectually settled to the separate use of a *feme covert*, the disclaimer of the husband will give effect to a disposition of the property made by the wife. Rycroft v. Christy, 3 Beav. 238.]

⁶ Lethieulier v. Tracy, 3 Atk. 728. Whetstone v. Bury, 2 P. W. 146.

⁷ 1 Ves. 27, [and 1 P. W. 56.]

(a) See Lancaster v. Dolan, 1 R. (Penns.) 231; Pullen v. Rianhard, 1 Wh. (Penns.) 514.

of the common law; for uses were considered as annexed to the estate of the feoffees in the land, and not to the land itself. Against the notion of an use attaching upon the land, we find the following curious argument:—"It is absurd to say that confidence and [*389] trust can be reposed in land, which wants sense; and which in regard of sense is inferior to brute beasts; and it would be less absurd to say that beasts may be trusted, than land, which wants sense and reason also, should be trusted."¹ But notwithstanding the force of this grave argument, the courts of equity in later times have said, that a trust shall never fail on account of the disability, or non-appointment of the trustee; because they hold that the trust, if properly created, will fasten upon, and attach to the land, intended to be made subject to it.² (a) The king,³ or a corporate⁴ body, may be a trustee; and where an estate was devised to the separate use of a *feme covert*, without the intervention of trustees, it was determined that the husband should be a trustee for his wife.⁵ So in a case⁶ where a devise to a corporation (in trust) was void by the late Statute of Mortmain, the court decreed that the heir at law of the *devisor [*390] should be a trustee for the purposes of his will.⁵

But although the courts now generally consider the trust as attaching upon the land itself, so as to convert all persons seised of, or acquiring the legal interest, into

¹ 1 Co. 127.

² *Moggridge v. Thackwell*, 3 Bro. C. C. 517. [7 Ves. 36, S. C.]

³ *Kildare v. Eustace*, 1 Vern. 439. 1 Ves. 453. 3 Atk. 309.

⁴ 1 Ves. 467, 468, 536. 2 Vern. 412.

⁵ *Bennett v. Davies*, 2 P. W. 316. 2 Ves. 665. [Where in the creation of a trust for the separate use of a married woman no trustees are interposed, the court will compel the party in whom the legal title is vested, whether the husband or any other individual, to perform the trust. *Bennet v. Davis*, 2 P. Wms. 316. *Parker v. Crooke*, 9 Ves. 583. *Rich v. Cockell*, ib. 369. *Major v. Lansley*, 2 Russ. & My. 355. *Stead v. Nelson*, 2 Beav. 245. *Newlands v. Paynter*, 4 My. & Cr. 408.]

⁶ *Sonley v. Clockmakers' Company*, 1 Bro. C. C. 81.

⁵ [The act 9 Geo. 2, c. 36, which takes away the right of devising to charitable uses, makes void not merely the charitable trust, but the estate clothed with it. *Carrick v. Errington*, 2 P. Wms. 361. *Doe v. Wright*, 2 Barn. & Ald. 710. *Pilkington v. Boughey*, Jur. 1841, p. 1149.]

(a) *Heth v. The Railroad Co.*, 4 Gratt. (Virginia) 482. Where a trust fund had been turned into land, held that a court of chancery will follow it for the benefit of *cestui que trust*, wherever it can be identified. *Pierce v. M'Keehan*, 3 W. & S. (Penns.) 280; *Kirkpatrick v. M'Donald*, 1 Jones, (Penns.) 393.

trustees, yet this rule has an exception in the case of a conveyance by a trustee for a valuable consideration to one who has no notice of the trust.⁶ In this instance the purchaser shall not be affected by the trust.

(2.) The rule will be further exemplified by considering how the estate of the trustee is affected by his own acts or incumbrances.

Before the Statute of Uses, the estate of the feoffee was subject to all the incidents to which a real ownership was liable; owing to this very notion, that the use was annexed to the estate of the person seised of the legal interest, and not to the land itself; and therefore if privity of estate failed in the person acquiring the legal seisin, there was an end of the use. Hence arose just complaints against uses and their inconveniences.

[*391] After the introduction of trusts, the Court of Chancery considered the trustee as having the legal ownership, so far only as to be beneficial to his *cestui que trust*, and without being subject to any disadvantage which may arise from the trustee personally, in consequence of his seisin of the legal estate.

The legal estate vested in the trustee is, in equity, protected against his judgments and other incumbrances, and against his bankruptcy,⁷ and from the dower and freebench⁸ of his wife, and from the tenancy by courtesy of the husband of a female trustee.⁹

In *Geary v. Bearcroft*,¹ it is said that if "a man conveys lands in trust, and the trustee commits felony, these lands shall be forfeited, though he may have relief in equity." It is the same, I apprehend, if the trustee commit treason; for as the *cestui que trust* forfeits his estate for treason, it is not consonant to justice that the trustee should forfeit it for the same offence. In the case of *Pawlett v. the Attorney-General*,² Baron Atkyns strongly supported this opinion, upon the ground that the king is

⁶ Snagg's case, cited 2 Freem. 43; pl. 47. 1 P. W. 278, 279. See as to the use before the statute, ante, 58.

⁷ See 1 P. W. 278. 1 Bro. C. C. 278. 2 P. W. 318. 3 P. W. 187, note A.

⁸ See *Hinton v. Hinton*, 2 Ves. 634, 638. *Noel v. Jevon*, 2 Freem. 43. *Bavant v. Pope*, 2 Freem. 71.

⁹ *Casborne v. Inglis*, 7 Vin. Ab. 157.

¹ *Carter*, 67. But see *Lane*, 39, 54.

² Hard. 465.

the fountain and head of *justice and equity, and that it shall not be presumed that he will be defective in either; and that it would derogate from the king's honour to imagine, that what is equity against a common person, should not be equity against him. Since however, the late statute,³ it is not probable that a question will arise, in the case of the king, either upon the felony or treason of a trustee. The case of a subject claiming as lord by escheat, is more doubtful. In the case of *Eales v. England*,⁴ the Master of the Rolls said, "If the trustee die without heir, the lord, by escheat, will have the land at law, yet subject to the trust here." The *point, I believe, has not been directly determined.^[*393]

³ 39 & 40 Geo. 3, c. 88, s. 12, it is enacted, "That it shall be lawful for his majesty, his heirs and successors, by warrant, under his or their sign-manual, to direct the execution of any trusts or purposes to which any manors, messuages, lands, tenements, or hereditaments, which have escheated or shall escheat to his majesty, his heirs or successors, shall have been liable at the time the same so escheated respectively, or would have been liable in the hands of any his majesty's subjects; and to make any grants of such manors, lands, tenements, and hereditaments, respectively, to any trustee or trustees, or otherwise, for the execution of such trusts; and to make any grants of any lands, tenements, or hereditaments, which have escheated, or shall escheat as aforesaid to any person or persons, either for the purpose of restoring the same to any of the family of the person or persons whose estates the same had been, or of rewarding any person or persons making discovery of any such escheat, as to his majesty, his heirs or successors respectively, shall seem fit; any thing in the said acts, or any of them, to the contrary notwithstanding." See 47 Geo. 3, sess. 2, c. 24, and 50 Geo. 3, c. 94.

⁴ Prec. Cha. 200. 1 Eq. Ab. 384, in note. *Contra in Peachy v. Somerset*, Prec. Cha. 454.

⁵ See the arguments in *Burgess v. Wheate*, 1 Eden. 177. [Now, by the act of 4 & 5 Will. 4, c. 23, s. 2, where any person seised of any land upon any trust, or by way of mortgage, dies without an heir, the Court of Chancery may appoint a person to convey such land in like manner as is provided by the act of the 11 Geo. 4 & 1 Will. 4, c. 60 (noticed below,) in case such trustee or mortgagee had left an heir, and it was not known who was such heir. This provision, it will be observed, extends to every case of escheat, whether to the crown or to a subject in consequence of a trustee dying without an heir. It had previously been held (in the case of the Attorney-General *v. The Duke of Leeds*, 2 My. & Keen, 343,) that the lord of a manor was neither bound by a trust, nor by an equity of redemption, when the estate of the trustee, or mortgagee, had escheated for want of an heir, in case the surrender to the trustee or mortgagee appeared upon the court-roll to be absolute and unconditional. But it would have been otherwise if the court-roll had contained notice that the surrender was upon trust, or by way of mortgage; because in that case the lord must be considered as having consented to the trusts, or the condition on which the surrender was made. *Weaver v. Maule*, 2 Russ. & My. 87.

By the same act of 4 & 5 Will. 4, c. 23, s. 3, it is enacted that no land, chattels, or stock vested in any person upon any trust, or by way of mortgage, or any profits thereof, shall escheat or be forfeited to his majesty, his heirs or successors, or to any corporation, *lord of a manor, or other person*, by reason of the attainder

[*394] In a case where a bill was brought to redeem a mortgage, which had vested in the king by the attainer of the heir of the mortgagee, Sir Matthew Hale was of opinion, that the king could not in equity be compelled to reconvey; but that an *amoveas manum* only lay in such case, and that was all which could be done in case a trustee forfeited his estate.⁶

In *Reeve v. the Attorney-General*, 2 Atk. 223, an estate escheated to the crown was charged in equity by the will of the person dying, and for want of whose heir the estate escheated, with several legacies. The bill was brought by the legatees to have the estate sold, and the question was whether an estate escheated to the crown can be affected by a trust. The bill was dismissed. See S. C. cited 1 Ves. 446, where it is reported Lord Hardwicke said, that where the crown was a trustee, the court had no jurisdiction to decree a conveyance, but they must go to a petition of right. S. C. cited in *Hovendon v. Lord Annesley*, 2 Schoal. 617.⁷

(3.) The legislature has, in several instances, enabled trustees incapacitated or restrained from conveying, to execute conveyances of the legal estate, vested in them as trustees. By the statute of 7 Anne, c. 19, infants having estates in lands by way of trust or mortgage, are [*395] enabled, under *the direction of the Court of Chancery, to convey the lands, of which they are trustees.⁸

It is conceived that this act extends only to express, and not to mere constructive, trusts; and indeed there are several determined cases, grounded upon this distinction;⁹ and although the Lord Chancellor King, in the case *Ex parte Vernon*,¹ made an order for an infant to

or conviction for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee, or survive to his co-trustee, or descend or vest in his representative as if no such attainer or conviction had taken place. But (by sec. 5) nothing contained in the act is to prevent the escheat or forfeiture of any land, chattels, or stock vested in any such trustee or mortgagee so far as relates to any beneficial interest therein of such trustee or mortgagee. By sec. 6, the above provisions are made retrospective.]

⁶ *Pawlett v. the Attorney-General*, Hard, 467.

⁷ [On the subject of forfeitures by trustees, see ante, p. 302, note 8.]

⁸ [This act has been repealed. See post.]

⁹ *Goodwyn v. Lister*, 3 P. W. 387. Anon. ibid. 389, in note A.

¹ 2 P. W. 549.

convey, under a constructive trust, on account of the small value of the estate, he expressly declared, that, where there is no declaration of trust in writing, he should, for the future, leave the cestui que trust to bring his bill, and have a decree against the infant to convey.

The case of *Price v. Oneby*, in 1745, and noticed by Mr. Fearne in his posthumous works,³ is indeed an instance in which the statute of Anne was not confined to express trusts, but extended to trusts arising under a decree. That, however, was the case of a partition, which, as Mr. Fearne observes, was for the infant's benefit, and what he was compellable to do, by law: and it is to be observed, that in a subsequent case,⁴ decreed in 1753, which was also a decree upon a partition, *the court refused to direct any conveyance [*396] of the legal estate, until one of the parties (an infant) came of age.

The case of *Smith v. Hibbart*⁵ is supposed to record the opinion of Lord Thurlow, that a constructive trust is within the statute of Anne: but in a late instance, in the case of *Jerdon v. Foster*⁶ and others, at the Rolls, there was a reference to the Master, to ascertain and state, whether an infant, subject to a constructive trust, was a trustee within the statute of Anne; and he reported, that the infant was not a trustee within that statute. The report was confirmed, but I have not learnt that the point was argued.

The statutes 39 & 40 Geo. 3, c. 88, s. 12, and 47 Geo. 3, sess. 2, c. 24, before noticed, have authorised the king to direct the execution of any trusts affecting lands, which have become vested in him in consequence of escheat, forfeiture, or otherwise; and by the statute 4 Geo. 2, c. 10, idiots and lunatics, and their committees, are empowered, under the direction of the Lord Chancellor, to convey lands vested in them in trust, or by way of mortgage.⁶

³ Fearne's Post. Works, 239.

⁴ *Tuckfield v. Buller*, Amb. 197.

⁴ 2 Dick. 730.

⁵ The decrees in this case are in March, 1804, and June, 1804. The Master's report is dated the 17th of March, 1809, and the decree confirming the report, the 12th of April, 1809.

⁶ [Since the last edition of this work was published (1824), the statutes of 6

[*397] Geo. 4, c. 74, 11 Geo. 4 & 1 Will. 4, c. 47, *11 Geo. 4 & 1 Will. 4, c. 60, 4 & 5 Will. 4, c. 23, 5 & 6 Will. 4, c. 17, 1 & 2 Vic. c. 69, and 2 & 3 Vic. c. 60, have been passed.

The following is a brief history of these acts.

The first statute on the subject was the 7 Anne, c. 19; and its object, as appears by the title, was "to enable infants who were seized or possessed of estates in fee, in trust, or by way of mortgage, to make conveyances of such estates."

Upon the construction of this act various questions from time to time arose, and received the determination of the courts. It was established, after some decisions to the contrary, that in order to bring a case within the act, the trust must be express, and not constructive merely. *Goodwyn v. Lyster*, 3 P. W. 386, (ed. 1826,) and cases there cited. *Ex parte Vernon*, 2 P. W. 549, (ed. 1826,) and 7 Price, 685, note. *Sikes v. Lister*, 5 Vin. Ab. 541, pl. 28. *Ex parte Janaway*, 7 Price, 679, and cases there cited. *Feerne's Post. Works*, 236. *Hawkins v. Obeen*, 2 Ves. 559. *Attorney-General v. Pomfret*, 2 Cox, 221. *Doe v. Martin*, 4 Durnf. & East, 50, 66. *Smith v. Hibberd*, 2 Dickens, 730. *Oneby v. Price*, *Fearn's Post. Works*, 239. *Ex parte Boehm*, 5 Madd. 124. *Re Moody, Tamlyn*, 11. See *Ex parte Carter*, 5 Madd. 81, where the infant heir of a messenger, to whom in bankruptcy a provisional assignment had been made, was held to be a trustee of the real estate of the bankrupt within this act. It was also held, that the infant must be a dry trustee having no interest, though it appears that the infant heir of a mortgagee was deemed a trustee within the statute, notwithstanding he had an interest in the mortgage-money, as co-executor and co-legatee with another person of the residue. — *v. Handcock*, 17 Ves. 384, and cases there cited. See also *Ex parte Bellamy*, 2 Cox, 422. The trust also was to be such as did not require any discretion in the infant. *Ex parte Chasteney, Jacob*, 56. It was not, however, held essential that the estate of the infant should be in fee-simple; for Lord Hardwick decided in *Ex parte Johnson*, 3 Atk. 559, that an infant to whom a trust was devised in tail might, under the statute, convey by common recovery. See also *Ex parte Smith, Ambler*, (Blunt's ed.), 624, and *Ex parte Bowers*, 3 Atk. 164. And it was also held, that under the statute, an infant feme covert might levy a fine. *Ex parte Maire*, 3 Atk. 479. *Lombe v. Lomb, Barnes*, 217. *Anon. Comyn's Reports*, 615; but see *Winnington v. Foley*, 1 P. W. 538; (ed. 1826.) And lastly, the act was decided to extend [*398] to estates *in the West Indies, Calcutta, Ireland, etc. *Ex parte Anderson*, 5 Ves. 240, and cases there cited, and *Evelyn v. Forster*, 8 Ves. 96. With respect to the costs of an infant trustee ordered to convey under this act, see *Ex parte Cant*, 10 Ves. 554, where the infant was allowed his costs; and the order was made that the infant should convey, the other party undertaking to pay such costs as should appear to be reasonably incurred.

The next statute which had relation to the estates of persons, under disability, was an act passed in the parliament of Ireland, the 11 Anne, c. 3. It was entitled, "An Act to enable Guardians, and others, to reserve Leases for Lives;" and its only object seems to have been to compel the execution of covenants, or agreements for renewal, where the persons who ought to have renewed under such covenants or agreements were under disabilities, or beyond the seas. For that purpose it is enacted, that where persons who in pursuance of agreement for renewal, ought to renew leases for lives, were under disability—if such disability arose from infancy, the guardian should, on order of the Court of Chancery or Exchequer, renew—and if from coverture, or being beyond the sea, or non-compos, the renewal was then to be by a Master in Chancery;—but in all cases the renewal was to be in the name of the person who ought to have renewed; and it was expressly provided, that the persons so under disability must be, at the time of renewal, compellable in law or equity to make such renewal.

The next act, in point of date, was also passed in the parliament of Ireland. It was the 2 Geo. 1, c. 6, entitled, "An Act to enable Infants who are seized or possessed of Estates in Fee, in Trust, or by way of Mortgage, to make Conveyances of such Estates;" and it was merely a transcript of the act of 7 Anne, c. 19, in England.

Then followed the 4 Geo. 2, c. 10; and its expressed object was, "to enable idiots and lunatics who are seized or possessed of estates in fee, or for lives, or terms of years in trust, or by way of mortgage, to make conveyances, surrenders, or assignments of such estates." This act did not extend to infants; and as estates for years were not included in the former act, infants were still unable to assign such interests. With respect to lunatics, it was considered to relate only to such as had been duly found so by commission, *Ex parte Gillam*, 2 Ves. jun. 587; or had been declared incompetent by the proper jurisdiction of their *own country. *Ex parte Otto Lewis*, 1 Ves. 298. And it was held, that the lunatic trustee must be without interest or duty. *Ex parte Tutin*, 3 [*399] V. & B. 149. As to the costs of an application under this act, see *Ex parte Richards*, 1 Jac. & Walk. 264, where the costs of the petition and reference were ordered to be paid out of the estate of the lunatic mortgagee, though the petition was by the mortagor, and not by the committee of the lunatic, which is the usual course. See also *Ex parte Brydges*, Coop. 290, as to the costs of a lunatic trustee conveying under the statute; but for observations on this case of *Ex parte Brydges*, and with reference to this subject generally, see *Ex parte Pearse*, 1 Turn. & Russ. 325. The Lord Chancellor there declared the general rule to be, that the costs of the committee of a lunatic trustee, conveying under the statute, must be paid by the *cestui que trust*. See also *In re Marrow*, 1 Cr. & Phil. 142. *Ex parte Ommaney*, 10 Sim. 298.

This statute was followed by an act passed by the parliament of Ireland on the same subject; namely, the 5 Geo. 2, c. 8, entitled, "An Act to enable Idiots and Lunatics, who are seized or possessed of Estates in Fee, or for Lives, or terms of Years in Trust, or by way of Mortgage, to make conveyances, Surrenders or Assignments of such Estates; and to prevent delay in Suits of Equity where Trustees cannot be found." This act was a transcript of the English act of 4 Geo. 2, c. 10, so far as that act extended: but it went considerably further, by enacting that where defendants in equity being only trustees, could not be found to serve them with the process of the court, an absolute decree might be made against them, as if they had been duly served with process, and had appeared and answered, and also appeared at the hearing; but it provided that no decree so obtained should bind them in respect of any interest they might have for their own use or benefit, or otherwise than as trustees.

Then came the 29 Geo. 2, c. 31, entitled, "An Act to enable Infants, Lunatics and Femes Covert to surrender Leases, in order to renew the same." Its object was not, like that of the Irish act of the 11 Anne, c. 3, to enforce the completion of agreements to renew for the benefit of lessee, but merely to enable infants, and other persons under disability, to take the steps requisite to place them in a situation to accept the new lease; and for that purpose it empowered them, by the direction of the court, to surrender the old lease without levying a fine.

*The next act, the 4 Geo. 3, c. 16, merely extended the act of 7 Anne, [400] c. 19, to the Duchy of Lancaster, the Counties Palatine of Chester, Lancaster, and Durham, and the Principality of Wales; but in its terms it went further than that act, by expressly including infants seized in fee, "or for the life or lives of one or more other person or persons."

Then came the 11 Geo. 3, c. 20: and as the act of 29 Geo. 2, c. 31, enabled infants, lunatics, and femes covert to surrender old leases, and to accept new ones; this act purported to "enable lunatics entitled to renew leases, their guardians and committees, to accept of surrenders of old leases, and to grant new ones." It is confined, however, to lunatics, and does not include infants and femes covert.

Afterwards, the 43 Geo. 3, c. 75, was passed. It was entitled, "An Act to authorize the Sale or Mortgage of the Estates of Persons found Lunatic by Inquisition in England or Ireland, respectively, and the granting of Leases of the same." It empowered the Lord Chancellors of Great Britain and Ireland, respectively, to order the freehold and leasehold estates of lunatics to be sold or mortgaged for raising money to pay their debts and perform their engagements; it empowered the committees of lunatics to execute, under order of the Lord Chancellor, powers of leasing vested in the lunatics; and it enabled the Lord Chancellor to order the committees of lunatics to make leases of the freehold,

copyhold, or leasehold estates of lunatics. The act was intended for the benefit of lunatics beneficially interested, and did not apply to lunatic trustees; and it will be observed, that the provision for sale or mortgage contained in it was confined to freehold and leasehold estates.

Subsequently, by the 59 Geo. 3, c. 80, entitled, "An Act concerning Common Recoveries to be suffered by Attorney in Courts of Ancient Demesne; and to explain an Act of his present Majesty, relative to the Sale or Mortgaging of Estates of Lunatics;" such of the provisions of the lastly-mentioned act of the 43 Geo. 4, c. 75, as authorized the sale or mortgage of estates belonging to lunatics were extended to estates held by them in ancient demesne, or by copy of court roll.

It having been found that the utility of the act 4 Geo. 2, c. 10, was much narrowed by its being construed to extend to cases only in which commissions of lunacy had been taken out; the 1 & 2 Geo. 4, c. 114, was next passed for the purpose of *extending the provisions of that act to cases of idiots and lunatics not having been found such by inquisition. Its title was, "An Act for the Conveyance, Surrender, and Assignment of Estates in Fee, for Lives, or Terms of Years, which shall be vested in Trust, or by way of Mortgage, in Idiots and Lunatics, not having been found such by inquisition."

None of the preceding acts apply to the public stocks; but the following acts having reference to the transfer of that species of property by persons unable or unwilling to transfer, were passed during the reign of George the Third.

The 36 Geo. 3, c. 90, entitled, "An Act for the Relief of Persons equitably and beneficially entitled to, or interested in, the several Stocks and Annuities transferable at the Bank of England." This act enabled the Courts of Chancery and Exchequer to order the transfer of stock, and the receipt of dividends, in all cases when the trustees thereof, or their representatives, should be absent out of the jurisdiction, or be bankrupt or lunatic, or should refuse to transfer the stock or receive the dividends, or it should be uncertain whether they were living or dead; and it provided also for the transfer of stock, standing partly in the name of the lunatic, and partly in the name of his committee, where the committee was dead, intestate, or was out of the jurisdiction, or had become lunatic, or it was uncertain whether he was living or dead.

The act itself owed its origin to a suggestion thrown out by the Lord Chancellor, in *Shaw v. Wright*, 3 Ves. 23; and the following questions have been decided in cases arising out of it. In *Simms v. Naylor*, 4 Ves. 360, the act was held to apply to a case where the trustee was of unsound mind, though no commission had been taken out, and through weakness of mind he had refused to transfer. In *Sylva v. Da Costa*, 8 Ves. 316, it was decided that the act did not go to the case of stock standing in the name of a lunatic resident at Amsterdam, though apparently found so by judicial proceedings in that place in the nature of a commission of lunacy. In *Rider v. Kidder*, 13 Ves. 123, a party appeared by her counsel, and admitted that she had not obeyed an order to transfer the stock; and the Lord Chancellor held that this was a refusal to transfer, and made an order under the act without a reference. And in *Ex parte Adams*, 2 Mer. 112, the court determined that the act did not extend to stock standing in the name of another, to which the lunatic was entitled as *administrator. Lastly, with reference to this act, it will be observed, that it extends only to stock and annuities transferable at the Bank of England.

The 52 Geo. 3, c. 32, entitled, "An Act for the Relief of Infant Suitors in Courts of Equity entitled to Stock or Annuities, in any of the Public or other Funds, transferable at the Bank of England." The object of this act was merely to authorise the court to apply the dividends of stock belonging to infants for their maintenance. Like the last act, it applied only to funds transferable at the Bank of England.

The 52 Geo. 3, c. 158, entitled "An Act to extend the provisions of an Act passed in the Thirty-sixth Year of the Reign of his present Majesty for the Relief of Persons equitably entitled to Stocks and Annuities transferable at the Bank of England; and of an Act passed in this present Session for the Relief of Infant Suitors entitled to the like Stock and Annuities to all other transferable Stocks and Funds." This act merely extended the provisions of the two

former acts to South Sea Stock, East India Stock, and all other transferable stocks.

The 57 Geo. 3, c. 39, entitled "An Act to extend certain provisions of the Acts of the Thirty-sixth and Fifty-second Years of the Reign of his present Majesty to matters of Charity and Friendly Societies." By this act the provisions of the two acts named in the title, were declared to extend to all cases of petitions on which the Courts of Chancery and Exchequer were empowered to grant relief, and make summary orders without suit, in matters of Charity, or Benefit or Friendly Societies. See *Re a Friendly Society*, 1 Sim. & St. 82, for a case held to be within this act in connexion with the former act of 36 Geo. 3, c. 90.

And the 1 & 2 Geo. 4, c. 15, entitled, "An Act to authorize the transfer of Stocks and Payment of Dividends of Lunatics residing out of England." This act enabled the Lord Chancellor to direct the transfer of stocks standing in the names of persons declared lunatic, residing out of England, and also the receipt of the dividends thereof; and it applied equally to lunatic trustees and lunatics beneficially entitled.

Such being the several statutes in existence relating to the transfer of estates and funds vested in persons incompetent or unwilling to convey or transfer the same, the 6 Geo. 4, c. 74, was at length passed for the purpose of consolidating and improving the provisions of such of the acts before enumerated, as had "reference to incompetent or unwilling trustees. It was entitled, "An [*_403] Act for consolidating and amending the Laws relating to Conveyances and Transfers of Estates and Funds vested in Trustees who are Infants, Idiots, Lunatics, or Trustees of unsound mind, or who cannot be compelled, or refuse, to act; and also the Laws relating to Stocks and Securities belonging to Infants, Idiots, Lunatics, and Persons of unsound mind;" and it commenced by repealing all the acts before-mentioned, except the 29 Geo. 2, c. 31, the 11 Geo. 3, c. 20, the 43 Geo. 3, c. 75, and the 59 Geo. 3, c. 80, (which latter acts, it will be recollectcd, did not apply to trustees,) and the two Irish acts of 2 Geo. 1, c. 6, and 5 Geo. 2, c. 8.

It then empowered infant trustees or mortgagees to convey by direction of the Court of Chancery or Exchequer, or of the Duchy or other courts there mentioned; and idiot or lunatic trustees, or mortgagees, or their committees, to convey by direction of the Lord Chancellor, although not found so by inquisition; and it authorised conveyances where the trustee or mortgagee was out of the jurisdiction, or it was unknown whether he was living or dead, or he refused to convey. It empowered the Lord Chancellor to appoint a person to transfer, and receive and pay over the dividends of, stocks standing in the name of trustees, or the legal personal representatives of trustees, who should be idiot or lunatic, either alone or jointly with other trustees or representatives, or which should be standing in the names of trustees, or the legal personal representatives of trustees, who should be out of the jurisdiction, or it should be unknown whether they were living or dead, or they refused to transfer the stocks or receive and pay over the dividends. (See on this *Ex parte Winter*, 5 Russell, 284.) It extended to trustees having beneficial interests, or having some duty to perform, so as to authorise conveyances and transfers to new trustees; and it extended to petitions in cases of Charity and Friendly Societies. It authorised the Court of Chancery, or Exchequer, to order dividends of stock belonging to infants to be paid to guardians for their maintenance; and it provided for the transfer of stock belonging to a lunatic, standing in the name of the lunatic, or in the name of the committee of the lunatic, where such committee should have died intestate, or should reside out of the jurisdiction, or have become himself a lunatic, or it should be unknown whether he was living or dead. It also provided for the case of lunatics *residing out of England; and it enabled the Court of Chancery, or Exchequer, to direct the costs of the several [*_404] matters arising under the act, to be paid out of the estates or funds in respect of which the same arose.

It will be observed that the foregoing act did not repeal, or in anywise alter, the two Irish acts of the 2 Geo. 1, c. 6, and the 5 Geo. 2, c. 8. But afterwards the 7 Geo. 4, c. 43, was passed, entitled, "An Act to amend the Laws in force in Ireland relating to Conveyances and Transfers of Estates and Funds vested in

Trustees;" and thereby after reciting the same two acts, and that it was expedient that further provision should be made for the facilitating the conveyance and transfer of estates and funds in Ireland vested in trustees; it proceeded to extend the provisions of those acts to trustees, or mortgagees of land in Ireland, who might be out of the jurisdiction of the courts there, or it might be uncertain whether they were living or dead, or they should refuse to convey; and it introduced the same relief and enactments with respect to stocks in Ireland, (the two former acts having no relation at all to stocks,) as had been introduced in England by the act of 6 Geo. 4, c. 74, with respect to stocks in England standing in the names of trustees, or the personal representatives of trustees who should be out of the jurisdiction, or it should be unknown whether they were living or dead, or they should refuse to transfer; and it was declared to extend to trustees having beneficial interests, or having duty to perform, and to cases of Charity and Friendly Societies; but it did not extend to lunatic trustees of stock.

No sooner, however, had the act of 6 Geo. 4, c. 74, come into operation, than the courts decided that it did not apply to constructive trusts; and therefore, in one most important particular, it carried the power of the court no further than the statute of Anne had done.

In *Dew v. Clarke*, 4 Russ. 511, it appeared that stocks were standing in the name of a person, as administrator with the will annexed of testator; that the letters of administration were recalled, on the ground of the insanity of the testator, who was declared by the Prerogative Court to have died intestate; and that administration was finally granted to his sole next of kin. On a petition, by the next of kin, to have the stock transferred to her under this act, the Lord Chancellor Lyndhurst said, "Though there can be no doubt as to the right of the petitioner *to the fund, I cannot make any order upon this petition. [*405] Upon consideration, I am of opinion, that the act must be confined to trusts created by express declaration. I am informed," he added, "that in the bill, as it originally stood, there was a clause which would have included constructive trusts, but Lord Redesdale objected to it strongly, and it was struck out."

In *Re Moody, Tamlyn*, 4, a person having contracted to sell, died; and his heir-at-law was an infant. On a petition for a conveyance under this act, the Master of the Rolls held, that it did not apply to constructive trusts, and dismissed the petition. In *King v. Turner*, 2 Sim. 549, the Vice-Chancellor said, "he had always considered that the statute of Anne did not apply to constructive trustees; that the late act 6 Geo. 4, c. 74, did not, as he conceived, apply; that the only distinction was, that the late statute extended to infant trustees having an interest, and to cases where there were executory trusts to be performed." And he accordingly held, that where the legal estate in a copyhold had descended to the infant heir-at-law of a copyholder, subject to a covenant by the latter to surrender to trustees in trust to sell, the infant heir was not a trustee within 6 Geo. 4, c. 74.

The next act which was passed on the subject now under discussion was the 9 Geo. 4, c. 78, entitled, "An Act for extending the Acts passed in the Forty-third and Fifty-ninth Years of the Reign of his late Majesty King George the Third, for the Sale and Mortgage of Estates of Persons found Lunatics by Inquisition taken in England and Ireland, so as to authorize such Sale and Mortgage for some purposes; and for rendering Inquisitions on Commissions of Lunacy taken in England, available in Ireland, and like Inquisitions taken in Ireland, available in England." It will be recollected that the before-mentioned acts of the 43 Geo. 3, c. 75, and the 59 Geo. 3, c. 80, authorized the sale or mortgage of lunatics' estates, for the purpose of paying their debts, or performing their engagements; and the present act only extended the provisions of those acts so as to authorize the sale or mortgage of lunatics' estates for other the purposes pointed out by the present act. It was confined, like the two former acts, to lunatics beneficially interested, and had no relation to lunatics holding in trust.

The act next following, in point of date, was the 1 Will. 4, c. 47, entitled, "An Act for consolidating and amending the Laws for facilitating the payment of Debts out of Real Estate;" *and with a view of providing for the payment of the debts of deceased persons out of their real estates, it was

thereby enacted, (among other things) sec. 11, that where any suit had been or should be instituted for payment of debts of a person deceased, to which the heir or devisee might be liable, and the court should decree the estate to be sold for payment of such debts, and by reason of the infancy of such heir or devisee, an immediate conveyance could not, as the law then stood, be compelled; the court might order such infant to convey to the purchaser, and the conveyance should be as valid as if the infant were of full age; and by sec. 12, persons having a legal estate, or other limited interest, were authorized to convey the fee-simple. The act, however, only extended to conveyances where a decree had been made for sale, and did not empower the court to direct mortgages to be made; but the latter authority was afterwards given by 2 & 3 Vic. c. 60. Applications under the act for a conveyance must be by petition, and not by motion. Anon. 1 Young & Coll. 75. And in *Turner v. Turner*, at the Rolls, 2 June, 1841, where the estate had been sold to pay debts, under a decree of the court, an order was made that the tenant for life should convey to the purchaser on the petition of a legatee. For cases on this act, see 8 Sim. 470, 557. 1 Keen, 130. 2 Keen, 603. 9 Sim. 135. 2 Russ. & My. 73, 74.

In consequence of the limited construction given to the act of 6 Geo. 4, c. 74, as hereinbefore stated, it was found that the court was still left without sufficient powers in cases of contracts for sale, and other constructive trusts; and that in particular it could neither order an infant heir to convey, for the purpose of completing a contract for sale entered into by his ancestor, nor could it direct a conveyance, where the estate contracted to be sold had been devised by the person contracting to sell, and such person had died before the contract was completed.

To remedy these defects, among others, the statute of 11 Geo. 4 & 1 Will. 4, c. 60, was passed. It was entitled, "An Act for amending the Laws respecting Conveyances and Transfers of Estates and Funds vested in Trustees and Mortgagees, and for enabling Courts of Equity to give effect to their Decrees and Orders in certain cases;" and in introducing the bill upon which this act was founded, Sir Edward Sugden is represented, in *Hans. Parl. Debates*, vol. xxii. New Series, to have expressed himself, as follows:—"The next object, on which, he begged *leave to say, he had expended many weeks' consideration, [*407] was to extend the sixth of his present Majesty, which was in itself an extension of the stat. of Anne, so as to make the contracts of heirs liable out of their real estates, and to invest the Court of Chancery with the power of giving a title. The giving the Great Seal the power of granting a title in cases of sales effected under its jurisdiction, of the property of infants, feme covert, and lunatics, was the next object of his bill. He also proposed to give it the same powers, in the cases of infant and lunatic trustees, and mortgagees. At present, lunatics were liable for all contracts entered into, when in a state of sanity; but the Great Seal, under whose jurisdiction their property fell, had not the power of granting a title, though they exercised that of sale."

Mr. Jemmett also, in the Introduction to his edition of this and the other acts, called Sir Edward Sugden's Acts, states, that the object of this act was to give to Courts of Equity ampler powers than they previously possessed, with regard to trustees and mortgagees, and to enable them to make a good and perfect title to whatever they sell; and that accordingly it furnishes the courts with new powers in cases of contracts for sale, and provides that the representatives of vendors, and also nominal purchasers, although there is no declaration of trust, are to be deemed trustees within the act, and consequently, although infants, are empowered and compellable to convey as the court shall direct,—this power, however, being guarded by requiring that a decree shall have been made for a specific performance, or establishing the trust; and further, that where the estate contracted to be sold is afterwards devised by the vendor, the devisee, though only tenant for life, may convey the fee. Mr. Jemmett also observes, that the act extends to every other case of a constructive trust, with a proviso as to adverse rights; but that it does not extend to cases of partition, nor cases arising out of the doctrine of election, nor to a vendor, unless in cases expressly provided for in the act.

Having premised thus much, it may be useful to state shortly the outline of

the act, and to point out the various decisions to which its several clauses have given rise.

S. 1 repeals the act of 6 Geo. 3, c. 74, the two Irish acts of 2 Geo. 1, c. 6, and 5 Geo. 2, c. 8, and the act of 7 Geo. 4, c. 43, except so far as the same relate to stock belonging beneficially to infants or lunatics.

*S. 2 establishes certain rules for the interpretation of the act.
[*408] S. 3 empowers the Lord Chancellor to direct committees of lunatic trustees, or mortgagees, to convey; and it has been decided, *Re Shorrocks, 1 Mylne & Craig, 31*, that the Vice-Chancellor has not power even to make a reference in the case of lunatic trustees, or mortgagees; although in a previous case, *Anon. 5 Sim. 322*, it was held, that the Vice-Chancellor might make the preliminary reference, though he could not order a conveyance. Neither will the Lord Chancellor adopt a finding of the Court of Exchequer, as to the lunacy of a person holding the situation of a trustee or mortgagee, but will order an inquiry himself. *Re Prideaux, 2 Myl. & Cr. 640*.

S. 4 empowers the Lord Chancellor to direct the committee of a lunatic trustee or executor to transfer, or join in transferring, stocks standing in the name of the lunatic, and to receive, or join in receiving, the dividends.

S. 5 enacts, that the Lord Chancellor may, before an inquisition of lunacy, appoint a person to convey or transfer. For the proper form of a reference under this clause, see *Re Pigott, 2 Russ. & My. 683*. See also *Re Welch, 3 My. & Cr. 292*. This section does not apply to cases where the fact of incompetency is disputed (5 Jur. 571,) nor to the case of a trustee rendered incompetent by any other cause than mental incapacity. 6 Jur. 545.

S. 6 enables infants seised or possessed of any land upon any trust, or by way of mortgage, to convey by direction of the Court of Chancery; and it has been held, that the infant heir of a mortgagee in fee, is a person seised by way of mortgage within the words of this section. *Re Kent, 9 Sim. 501*. The infant heir of a deceased vender is also within this section. 6 Sim. 9. But where one of several co-partners, to whom real property has been conveyed as tenants in common, dies, a settlement of accounts between his executors and the surviving partners does not render the heir of such deceased co-partner a trustee within this section.

S. 7 enables infant trustees or mortgagees of land within the jurisdiction of the Courts of Lancaster, Chester, Durham, and Wales, to convey by direction of those courts; and it would seem that those courts have no power under this act except where the disability of the trustee or mortgagee arises from infancy.

S. 8 enacts, that where any person seised of any land upon *any trust [*409] shall be out of the jurisdiction, or it is uncertain whether he be living or dead, or, if known to be dead, it shall not be known who is the heir; or if any trustee seised as aforesaid, or the heir of any such trustee, shall refuse to convey, the Court of Chancery may appoint a person to convey. It will be observed, that this section applies only to trustees, and not to mortgagees. And therefore in *Re Goddard, 1 My. & Keen, 26*, where a mortgagee in fee died intestate as to his real estate, and his heir was not known, the court refused, under this section, to appoint a person to re-convey the estate to the person entitled to the equity of redemption, on payment of the mortgage-money to the executor of the mortgagee. And again, in *Re Stanley, 5 Sim. 320*, where a mortgagee in fee had died intestate as to her real estate, and her heir was not known, the court, on the petition of her executor, refused to make an order for a conveyance under this act; and again, in *Re Dearden, 3 My. & Keen, 508*, the heir of a mortgagee was held not to be a trustee within this section. But although this section does not apply to mortgagees, or the heirs of mortgagees, it has been held in the case of *Re Kent, 9 Sim. 501*, before adverted to, that the heir of a mortgagee comes within the sixth section; and in *Prendergast v. Eyre, 1 Lloyd & Gould, 11*, where a mortgagee had filed a bill of foreclosure, and a decree for sale had been made, and the mortgagee had died leaving an infant heir, such infant heir was held to be a trustee within the eighth and eighteenth sections of this act. See also 7 Sim. 170, 9 Sim. 642. With respect to the trust to which the present clause is intended to apply, it must be an express or clear trust, and the title of the cestui que trust must not depend on any facts of importance to be ascertained; *Re Merry, 1 My. & K. 679*: but, at the same time, the court has a discretionary

power under this section, taken in connexion with the twelfth, to make an order on petition, if it thinks fit, and in proper cases will do so. *Re de Clifford*, 2 My. & K. 624. As to the mode of conveyance under this clause, see *Ex parte Foley*, 8 Sim. 395; and with respect to the species of interest to be conveyed, it must be the legal interest only in the subject of the trust or mortgage; and accordingly the court will not order the assignment of a mortgage-debt under this clause. *Price v. Deerhurst*, 8 Sim. 617. That a mortgagee resident out of the jurisdiction is not within this clause, see 1 Beav. 208. Lastly, it will be observed, that this clause does not extend to the case of a *trustee dying [*410] without an heir, but only to the case of a trustee known to be dead, and it shall not be known who is his heir. And it seems that the provision does not apply to a case where it is known that there is no heir; 10 Bing. 44. See generally on this clause Mr. Jemmett's edition of Sir Ed. Sugden's *Acts*, and 6 Sim. 645, 10 Adol. & El. 272, 4 You. & Col. 247.

S. 9 enacts, that when trustees of leasehold estates are out of the jurisdiction, or it is uncertain whether the trustee last known to have been possessed be living or dead, or if any trustee possessed as aforesaid, or the executor of any such trustee, shall refuse to assign or surrender, the Court of Chancery may appoint a person to assign or surrender. This clause does not go so far as the last in providing for the case where the trustee being known to be dead, it is unknown who is his representative; and Mr. Jemmett intimates that this was done purposely, because the framer of the act was anxious not to interfere with the jurisdiction of the Ecclesiastical Court. See also *Re Anderson*, 1 Lloyd & Gould. 27.

S. 10 enacts, that where any person in whose name as a trustee or executor (either alone or together with the name of any other person,) or in the name of whose testator, (whether as trustee or beneficially,) any stock shall be standing, or any other person who shall otherwise have power to transfer or join with any other person in transferring any stock to which some other person shall be beneficially entitled, shall be out of the jurisdiction, or it shall be uncertain whether he be living or dead, or shall refuse to transfer the stock or receive and pay over the dividends, the Court of Chancery may appoint a person to transfer the stocks, or receive and pay over the dividends. Upon this clause some decisions have taken place. In *Ex parte Dover*, 5 Sim. 600, the court, under the authority of this and the twenty-second clause, ordered stock to be transferred from the names of the persons in whose names it was standing, into the name of a new trustee, although the circumstances were peculiar, and such as rendered it doubtful whether such persons held the same in the character of executors or trustees. See also 10 Sim. 605. In *Parker v. Burney*, 1 Beav. 492, it appeared from proceedings in the cause, that the person in whose name the stock was standing was a trustee within the meaning of the act; and the court, on a proper affidavit of his disability, appointed a person to transfer without a previous reference. See also *Walton v. Merry*, *6 Sim. 328. In *Ex parte Winter*, [*411] 5 Russ. 284, and *Ex parte Hagger*, 1 Beav. 98, persons were held to be, executors within the meaning of this clause, although they had not taken out probate. With respect to the case of a trustee or executor being out of the jurisdiction, it would seem that a temporary absence from the jurisdiction is not sufficient to justify an application under this act. *Hutchinson v. Stephens*, 5 Sim. 498. As to a refusal to transfer, see *Re Law*, 6 Jur. 615. And lastly, it may be observed, that as this clause does not include the case of infant trustees, so there seems to be no jurisdiction given in any part of the act with respect to stock standing in the name of an infant. *Watts v. Scrivens*, 1 Beav. 223.

S. 11 enacts, that every direction or order to be made in pursuance of this act by the Lord Chancellor, or the Court of Chancery, or any other court before-mentioned, shall be signified by an order to be made in any cause depending in such court respectively, or upon petition in the lunacy or matter, to be presented by the persons for that purpose pointed out by this section. And with reference to this clause, it has been decided that where the court, in any proceeding in a cause, declares a party to be a trustee, it may by the same order direct a conveyance to be made, and a petition is not necessary. *Walton v. Merry*, 6 Sim. 328. But where a decree declared a defendant against whom the bill had been taken *pro confesso* to be a trustee of stock for the plaintiffs, the

court declined to refer it to the master to appoint a person to transfer the stock in the place of the defendant, except upon a petition under this act. *Fellowes v. Till*, 6 Sim. 319. And in *Prytharch v. Havard*, 6 Sim. 8, where a decree for specific performance had been made against the infant heir of a vendor, it was held that a petition must be presented under this act for an order that the infant may convey to the purchaser. A petition is not necessary where there is a suit. *3 My. & Keen*, 443. 1 Keen, 129.

S. 12 enacts, that in the case of an old trust, or where it does not seem proper to make an order upon petition, the Lord Chancellor or court may direct a bill to be filed. This provision was not in any of the former acts. See as to this clause, *Re de Clifford*, 2 Myl. & K. 626, referred to under section eight.

S. 13 declares that any committee, infant, or other person directed by this act to convey or transfer, or to receive and pay, may be compelled to do so in like manner as trustees of full age *and sane mind. For a decision on this clause, see 1 Beav. 223.

S. 14 provides, that where the person to whom money is payable in discharge of any mortgage, of which a conveyance is to be obtained under this act, shall be an infant, the money so payable may be paid into the Bank to the credit of the cause, if there be a cause, or to the credit of the infant, if there be no cause. This was a new provision. In *Prendergast v. Eyre* before-mentioned, Sir Edward Sugden says, that in framing this act, "he was much embarrassed by the case of an infant mortgagee entitled to the mortgage-money; for no former act had provided how the money was to be paid and secured for the infant. The fourteenth and fifteenth sections were framed with a view to obviate this difficulty."

S. 15 enacts, that every person being in other respects within the act, shall be deemed to be a trustee within the meaning of it, notwithstanding he may have an interest, or some duty to perform; but in such case, and in every case of a mortgagee (not being a naked trustee), the Lord Chancellor or court may direct a bill to be filed to establish the right, and not make an order for conveyance or transfer till decree made. This clause varies considerably from the corresponding clause (s. 10) in 6 Geo. 4, c. 74; particularly in introducing a provision for filing a bill to establish the right.

S. 16 declares, that where land has been contracted to be sold, and the vendor has died, either having, or not having received the purchase-money, and a specific performance has been decreed either in the lifetime of the vendor, or after his decease, and where one person has purchased an estate in the name of another, and the nominal purchaser shall on the face of the conveyance appear to be the real purchaser, and a decree shall have declared such nominal purchaser to be a trustee for the real purchaser, the heir of the vendor, or the nominal purchaser, or his heir, shall be a trustee for the purchaser within the act. This provision, which was wanting in all the former acts, was introduced to remedy one of the chief defects of the old law, and seems more particularly to have been founded, as to the representatives of vendors, on *Goodwyn v. Lister*, 3 P. W. 386 (ed. 1826); and, as to nominal purchasers, on *Ex parte Vernon*, 2 P. W. 549 (ed. 1826). See also *Re Moody*, Tamlyn, 4; and *King v. Turner*, 2 Sim. 551.

*S. 17 enacts, that where land has been contracted to be sold, and the vendor has died having devised the same for life, with a remainder over, which may not be vested, or which may be vested in some person from whom a conveyance cannot be obtained, or by way of executory devise, and a specific performance of the contract has been decreed, the court making the decree may direct the tenant for life, or the first executory devisee, to convey the fee-simple to the purchaser. This provision was also wanting in all the former acts, and was introduced here to carry out still further the remedy which this act proposed to apply in cases of contract for sale. As to the costs of completing a title under this clause, see 4 Yo. & Col. 472.

S. 18 declares, that the act shall extend to every other case of a constructive trust, or trust arising or resulting by implication of law; but where the trustee claims a beneficial interest, no order for a conveyance or transfer by him shall be made till after a declaration by the court in a suit, regularly instituted, that he is a trustee for the person seeking the conveyance or transfer: and "this act

shall not extend to cases upon partition, or cases arising out of the doctrine of election in equity, or to a vendor, except in any case hereinbefore expressly provided for." This provision also is an addition to the former acts, and completes the powers which this act gives in the case of constructive and resulting trusts. Under this section, in connexion with the eighth, the infant heir of a mortgages who had filed a bill, and in his lifetime obtained a devise for sale, was held to be a trustee within the meaning of the act. *Prendergast v. Eyre*, 1 Lloyd & Gould, 11. An exchange of lands is not within this section. 1 Keen, 502.

S. 19 enacts, that where a feme covert would be a trustee, mortgagee, heir, or executor, within the meaning of the act, and the concurrence of her husband shall be necessary in any conveyance, transfer, receipt, or payment, then such husband, whether under any disability or not, shall be deemed a trustee within the meaning of the act. This provision as to the husband does not seem to have existed in the former acts; but under the act of Anne, the wife might convey by fine; see ante, note on 7 Anne, c. 19.

S. 20 declares, that the provisions of the act for obtaining conveyances from lunatics, shall include lunatics who by force of any law for payment of debts out of real estate, would be compellable *to convey if of sound mind. [*414] This was intended to obviate the difficulty occasioned by the decision in *Ex parte Tutin*, 3 Ves. & B. 150, before referred to under the statute of 4 Geo. 2, c. 10, and which difficulty had not been removed by any of the succeeding acts.

S. 21 extends the act to petitions in cases of charity and friendly societies; and with respect to this, it may be doubtful if in the case of a friendly society there should not be some inquiry whether such society was duly constituted and is still legally existing; because in *Ex parte Norrish*, Jacob, 162, the Master of the Rolls refused an application under the 33 Geo. 3, c. 54 (the Friendly Societies' Act), that a late trustee should transfer some of the society's funds to a new trustee, on the ground that it appeared the society had deviated from its rules, and had thereby become dissolved, so that the court had no longer any jurisdiction under the act; and if any relief could be given it must be upon bill. But orders under this act are not, it appears, very common; for the act of the 10 Geo. 4, c. 56, entitled "An Act to Consolidate and Amend the Laws relating to Friendly Societies," gives a very similar relief, by providing (sections fifteen and sixteen) that where trustees of "lands, tenements, or hereditaments, or other property" belonging to a friendly society, are out of the jurisdiction of the Court of Exchequer in England or Ireland, or the Court of Session in Scotland, or of the Court of Great Sessions in Wales (since abolished), or are of unsound mind, or it be uncertain whether they are living or dead, or they refuse to convey to the person duly nominated as trustee in their stead, it shall be lawful for such courts to appoint a person to convey; and that where trustees of stock in the Bank of England are out of the jurisdiction of the said courts, or are bankrupt or lunatic, or it is uncertain whether they are living or dead, the said courts may order such stocks to be transferred, and the dividends paid to such person as the society may appoint.

S. 22 provides, that where a trust is clear, the *Lord Chancellor* may appoint new trustees on petition, without bill filed, although there is no power under the instrument creating the trust to appoint new trustees. With respect to this clause, which was new so far, at least, as it gave the court power to appoint new trustees in the absence of a power to do so in the original instrument, it may first be mentioned, that under its authority the **Vice-Chancellor*, in Ex [415] parte Shick, 5 Sim. 281, appointed a new trustee in the place of one who was out of the jurisdiction (without a reference to the master), on the ground that the petitioner was the only person interested in the property. And, generally, that this clause gives jurisdiction only in cases where the trustee is out of the jurisdiction, or is under any of the disabilities pointed out by the act, such as infancy or lunacy, and where the case is plain and simple, as in a trust recently created, respecting which no question can arise, see *Re Nicholls*, 1 Lloyd & Gould, 17. *Re Whitley*, ib. 23. *Re Fitzgerald*, ib. 20. *Re Earl of Mayo*, ib., temp. Plunkett, and Jemmett's ed. of Sugden's Acts: and see also *Re Dover*, 5 Sim. 500, and cases under tenth section, supra. The court may appoint

new trustees under this section, although the instrument creating the trust contains a power to appoint new trustees. 10 Sim. 252.

S. 23 enacts, that where all the persons in whom any land may have been vested in trust for any charity are dead, the Court of Chancery, on a specified notice given, may appoint new trustees, and order a conveyance to them without the necessity of any decree. This provision was not contained in any of the former acts.

S. 24 enacts, that where a defendant who is only a trustee cannot, on diligent search, be found, the Court of Chancery, on affidavit thereof, may hear the cause, and make an absolute decree against him, as if he had been served with process, and appeared; but such decree is not to bind him in respect of any interest he may have at the time of making the decree for his own use, or otherwise than as a trustee. This provision was new so far as the former English acts were concerned; but a clause of a similar nature was contained in the Irish act of the 5 Geo. 2, c. 8, before referred to.

S. 25 provides, that the costs and expenses of petitions, orders, directions, conveyances, and transfers under the act, may be paid out of the land, or stock, or rents, or dividends, in respect of which same shall be made, or in such other manner as the court shall think proper. As to costs under the act of 7 Anne, c. 19, see *Ex parte Cant*, 10 Ves. 554; and under 4 Geo. 2, c. 10, see *Ex parte Richards*, 1 Jac. & Walk. 264; *Ex parte Brydges, Cooper*, 290, and *Ex parte Pearse*, 1 Turn. & Russ. 325, and observations ante. See also *Ex parte Ommaney*, 10 Sim. 298. In *Re Marrow*, 1 Cr. & Phil. 142.

*S. 26 declares, that the powers given by this act to the Lord Chancellor shall extend to all land and stock within the dominions, plantations, and colonies of his majesty (except Scotland and Ireland): and

S. 27 declares, that the Lord Chancellor of Ireland is to exercise such powers with respect to all land and stock in Ireland: and

S. 28 provides, that the powers given to the Lords Chancellors of Great Britain and Ireland may be exercised by the Lords Keepers, or Commissioners of the Great Seals of Great Britain or Ireland, as the case may be.

S. 29 enacts, that the powers given to the Court of Chancery in England shall extend to land and stock within any of the dominions, plantations, and colonies of his majesty (except Scotland); and it has been decided in *Price v. Dewhurst*, 8 Sim. 617, that they do not extend to land out of the queen's dominions, as in the Danish island of St. Croix.

S. 30 extends to the Court of Exchequer the powers given to the Court of Chancery.

S. 31 gives the same powers to the Courts of Chancery and Exchequer in Ireland with respect to land and stock in Ireland, as are given to Courts of Chancery and Exchequer in England with respect to land and stock in England.

S. 32 declares who are the parties to be named in the orders of the court for making transfers of stock; namely, either the committee of the lunatic in whose place the transfer is to be made, or a co-trustee or co-executor of the person in whose place such person shall be directed to transfer, or some officer of the company in whose books the transfer is to be made; and, in the case of the Bank of England, by the secretary or deputy-secretary, or accountant-general, of the bank.

S. 33 provides, that the act is to be an indemnity to the Bank and all other companies for all acts done under it.

The next act in point of date was the 11 Geo. 4 & 1 Will. 4, c. 65, entitled, "An Act for consolidating and amending the Law relating to Property belonging to Infants, Femes Covert, Idiots, Lunatics, and Persons of Unsound Mind." The object of the act was to extend the powers of the court with respect to the estates of infants, femes covert, and lunatics, in granting and renewing leases for their benefit, admitting them to copyholds by their guardians, committees, or attorneys, applying dividends of infants' stock *for their maintenance, and in other matters of that description. And as the act of 11 Geo. 4 & 1 Will. 4, c. 60, though it provided for the case of infant heirs carrying into effect the contracts of their ancestors, did not provide for the case of persons who having themselves, when of sound mind, entered into contracts for the sale

or disposition of land, afterwards became lunatic, and became thereby incapable of performing such contracts, the present act purported to make good that deficiency; and by section 27 enacted, that when any person who should have contracted to sell, mortgage, let, divide, exchange, or otherwise dispose of any land, should afterwards become lunatic, and a specific performance of the contract should have been decreed either before or after the lunacy, the committee of the lunatic, by direction of the Lord Chancellor, might convey such land, in pursuance of the decree, to such person as the Lord Chancellor should direct, and the purchase-money should be paid to the committee. The act also empowered the Lord Chancellor to order estates of lunatics to be sold or mortgaged, to raise money for payment of their debts or engagements; and with a view of re-enacting their provisions in an amended form, it repealed the Irish act of 11 Anne, c. 3; and the acts of 9 Geo. 1, c. 29; 29 Geo. 2, c. 31; 11 Geo. 3, c. 20; 43 Geo. 3, c. 75; 47 Geo. 3, c. 8; 59 Geo. 3, c. 80; 9 Geo. 4, c. 78; and so much of 6 Geo. 4, c. 74, as related to funds belonging beneficially to infants, idiots, or lunatics. With respect to the repeal of the 11 Anne, there was this peculiarity about it, that instead of reintroducing its provisions in a substantive form into the present act, as was done with respect to the provisions of the other acts, it was declared that its provisions, "which had been so long in force in Ireland, should remain unaltered;" and it was then enacted, that the clauses and provisions contained in it should be and continue in force in the same manner to all intents and purposes as if the said clauses and provisions, and every part thereof "had been repeated and re-enacted in this act;" and, further, that none of the provisions in this act contained for authorising the acceptance of surrenders, or the making of new leases on behalf of any person who in pursuance of any covenant for renewal ought to make such new lease, should extend to land in Ireland. For decisions on this act, see 1 My. & Keen, 150; 2 My. & Keen, 318.

On perusing the act of 11 Geo. 4 & 1 Will. 4, c. 60, it will *have been observed, that no provision was made for the case of a trustee or mortgagee of land dying without an heir. Section eight, indeed, provided for the case of a trustee, who is known to be dead, and it is not known who is his heir; but it did not include the case of a trustee dying without any heir at all; nor, as has been before stated, did it extend to mortgagees. It became necessary, therefore, to remedy this defect; and accordingly a clause was introduced into the subsequent act of 4 & 5 Will. 4, c. 23, entitled "An Act for the Amendment of the Law relative to the Escheat and Forfeiture of Real and Personal Property holden in Trust," by which (s. 2) it was enacted, that where any person seized of any land upon any trust, or by way of mortgage, dies without an heir, the court may appoint a person to convey in like manner as is provided by 11 Geo. 4 & 1 Will. 4, c. 60, in case such trustee or mortgagee had left an heir, and it was not known who was such heir; and, by a subsequent clause (s. 6), it was further enacted, that in all cases where, before the passing of the act, any trustee of land or stock should have died without an heir, or have been convicted of an offence by which the said land or stock had escheated or become forfeited, the said land or stock so escheated or forfeited should become subject to the order of the Court of Chancery for the use of the party beneficially interested, and be subject to such orders and regulations under the act of 11 Geo. 4 & 1 Will. 4, c. 60, as if such trustee so dead without an heir, or so convicted, were out of the jurisdiction of, or not amenable to, the process of the court, without having been so convicted: provided always, that the clause should not extend to land or stock which at the time of passing the act was vested in any person by grant made subsequently to the escheat or forfeiture, nor to any land or stock which had been in possession under the escheat or forfeiture for more than twenty years prior to the passing of the act.

While the 11 Geo. 4 & 1 Will. 4, c. 65, made various provisions with regard to the renewal of leases, whether for lives or years, of lands in England belonging to infants, females covert, or lunatics, it expressly confined the remedy as to Ireland, in that respect, to the provisions of the act of 11 Anne, c. 3, and excepted lands in the latter kingdom from any of the other clauses relating to the surrender and renewal of leases; and this appears to have been done from the fear that as the act of 11 Anne had been in operation so long in Ireland, and the

[*419] title to so much property *depended on its provisions, it would be dangerous to alter or vary them; (see Sugden's *Acts*, by Jemmett.) Subsequent experience, perhaps, showed that this apprehension was unfounded; but by 5 & 6 Will. 4, c. 17, entitled, "An Act to extend to Ireland certain provisions of an Act made and passed in the First Year of His present Majesty's Reign, intituled, 'An Act for consolidating and amending the Laws relating to Property belonging to Infants, Femes Covert, Lunatics, and Persons of Unsound Mind,'" —after reciting the 11 Anne, and section 16 and (in part) section 19 of 1 Will. 4, c. 65, and that it was expedient that the powers of the courts in Ireland over land in Ireland should, in the respects aforesaid, be as large as the powers given by the act of 1 Will. 4, c. 65, to the courts in England over lands there; it was enacted, that the 11 Anne, c. 3, and so much of the 1 Will. 4, c. 65, as re-enacted it, should be repealed; and it was further enacted, that the several clauses and enactments in 1 Will. 4, c. 65 contained, and in the present act "particularly recited," should be extended to Ireland. In reciting, however, the 19th section of 1 Will. 4, c. 65, which has relation to renewals by lunatics, the provision at the end thereof, that the same should extend as well to cases where the lunatic should not be compellable to renew, but it should be for his benefit to do so, as to cases where a renewal might be effectually enforced against the lunatic, if of sound mind, was omitted; and as the act now in question only extended to Ireland the clauses and enactments of 1 Will. 4, c. 65, thereinbefore "particularly recited," it would seem that the above provision is not extended to Ireland. The effect of it, if enacted, would have been not only to enlarge extremely the powers of 11 Anne, with respect to renewals by lunatics, but even to alter its principle so far as regarded such renewals; for the whole authority of that act depended on a proviso, that the persons under disability (whether infants, lunatics, under coverture, or beyond the seas) should, at the time of the renewal of the lease, be compellable in law or equity to make such renewal. But as the act of the 11 Anne has now been entirely repealed, and as the provision at the end of section 19 in 1 Will. 4, c. 65 has not been extended to Ireland, there seems to be no enactment, either one way or the other, to declare whether the renewal should be made in cases only where the lunatic is compellable to renew, or in cases also where a renewal would be for his benefit. With respect, however, to infants [*420] and femes covert, *the same difficulty does not exist; for section 16, in 1 Will. 4, c. 65, which has been in every part extended to Ireland, expressly confines the powers of the act to cases of infants and femes covert, who in pursuance of any covenant or agreement, might, if not under disability, be compelled to renew.

The act of 5 & 6 Will. 4, c. 17, having repealed the statute of 11 Anne, c. 3, and having, in manner hereinbefore mentioned, extended to Ireland the 16th and 19th sections of the act of 1 Will. 4, c. 65, for the renewal of leases by infants, femes covert, and lunatics, omitted to extend to that kingdom those provisions of the same act which had reference to renewals by persons out of the jurisdiction. The consequence was, that no authority existed in Ireland to direct the renewal of leases, where the parties compellable to renew were out of the jurisdiction; and to remedy that inconvenience, and to extend still further the powers which had previously been in force under the 11 Anne, the act of 1 & 2 Vic. c. 62, was passed, entitled, "An act to enable Masters of the Court of Chancery in Ireland, upon application to that Court by Petition, to execute Renewals of Leases for Lives containing Covenants for Renewal, in the names of Persons bound by such Covenants to execute the same, and being out of the jurisdiction of the Court; and to extend such Powers to cases of Terms for Years, whether absolutely or dependent upon Lives." The general scope and purport of this act appears from its title; and it accordingly empowered the Masters of the Court of Chancery in Ireland to grant renewals of leases for years or lives [the 11 Anne extended only to leases for lives,] where the persons compellable to renew the same are out of the jurisdiction; with a proviso, that in every case it should be in the discretion of the court, if it should seem requisite, to direct a bill to be filed to establish the right of the party seeking the renewal, and not to make the order for such renewal, unless by the decree in such cause, or until after the decree should have been made.

(4.) If a trustee devises all the real *estates, [*421] of which he is seised, to A. and his heirs generally : the legal estate, of which he is trustee, will pass to the devisee, subject to the original trust.' But *if the [*422] real estate of the trustee is devised for purposes,

The next act on this subject is the 1 & 2 Vict. c. 69, entitled, "An act to remove Doubts respecting Conveyances of Estates vested in Heirs and Devisees of Mortgagors." The third section of this act, which provides that the acts of 1 W. 4, c. 60, and 4 & 5 W. 4, c. 23, shall not be construed to extend to any case of a person dying seised by way of mortgage, other than such as are by that act expressly provided for, does not repeal any part of those two former acts. See 8 Sim. 392. 1 Beav. 208.

Afterwards came the act of 2 & 3 Vic. c. 60, entitled, "An Act to explain and extend the provisions of an Act passed in the First Year of His late Majesty, King William the Fourth, intituled, 'An Act for consolidating and amending the Laws for facilitating the Payment of Debts out of Real Estate.'" It will be recollectcd, that the act of the 1 Will. 4, c. 47, authorised conveyances by infants and by tenants for life, and persons having limited interests, in cases only where a decree for sale had been made, and that it gave no authority to the court to order mortgages to be made for the purposes of the act nor did it contain any direction with respect to the surplus money arising from the sale, after payment of the debts. Doubts, moreover, were entertained, whether it applied to cases where the tenant for life, or other the person having a limited interest, was also an infant ; and as it was considered expedient that provision should be made to supply the deficiency in the former cases, and to remove all doubts in the latter, the act in question, after reciting sections 11 & 12 of 1 Will. 4, c. 47, enacted, that the same should extend to authorise courts of equity to direct mortgages, as well as sales, to be made of the estates of infant heirs, or devisees, and also of lands and hereditaments devised in settlement, and to authorise sales and mortgages to be made in cases where the tenant for life, or other person having a limited interest, was an infant. And it declared that the surplus of the money arising from such sales, or mortgages, should descend in the same manner as the estates sold or mortgaged would have done.]

⁷ Braybrooke v. Inskip, 8 Ves. 417.

Ex parte Whitacre in the matter of Samuel Vallis, an infant. At the Rolls, 22nd July, 1807.

A mortgagee in fee devised "all the rest and residue of his lands and hereditaments, and goods, chattels, *mortgages*, moneys, and securities for money, and all other his real and personal estate, not thereinbefore disposed of, unto his nephew Samuel Rolles, John Rolles, and Samuel Vallis, and to his grand-nephew, Samuel White, to be equally divided between and among them *as tenants in common*, and to their respective heirs, executors, and administrators, according to the nature of their respective estates;"—and the testator appointed the said four devisees, executors of his will.

Samuel Vallis, one of the devisees, died, leaving an infant heir-at-law ; and it was referred to the master to inquire, whether the infant heir was a trustee or mortgagee within the stat. of 7th Anne. The master reported, that as the words in the residuary clause appeared to him to be sufficiently comprehensive to include the legal estate in the mortgaged premises, he conceived, that the freehold and inheritance of the said mortgaged premises passed by the will of the mortgagee to the said Samuel Rolles, John Rolles, Samuel Vallis, and Samuel White, as tenants in common : and he was of opinion that the said Samuel Vallis was an infant mortgagee of one fourth part of the mortgaged premises. The master's report was confirmed, and the infant was directed to convey pursuant to the act.

[For cases as to the effect of a general devise on estates vested in the testator as mortgagee, see Silvester v. Jarman, 10 Price, 78. Mather v. Thomas, 10

or under limitations, inconsistent with the trust under which the trustee holds the legal estate, the devise will not include the trust property; as if the devise be of all the trustee's real estates to A., in trust to sell, or to A. for life, with remainder to his first and other sons successively in tail, or to A. in tail, or to A. and his heirs, charged with the payment of the testator's debts and legacies; for as, in these cases, the trustee could not equitably bind the estate with limitations, or subject it to equitable interests of this kind, courts of justice will presume that he did not intend to devise the trust estate.

The rule which I have stated, may, I think, be considered as the result of recent determinations; but the decisions have been various and *contradictory. [*423] The old rule was otherwise; for the courts of law,

Bing. 44. 6 Sim. 115, S. C. *Ex parte Barber*, 5 Sim. 451. *Doe v. Lightfoot*, 8 Mee. & Wels. 553. It seems that such estates will pass by a devise of "securities for money" to a party and his heirs.]

* See *Duke of Leeds v. Munday*, 3 Ves. 348. *Ex parte Sergison*, 4 Ves. 147. Attorney-General *v. Buller*, 5 Ves. 339. *Ex parte Brettell*, 6 Ves. 577. Attorney-General *v. Vigor*, 8 Ves. 276. *Braybrooke v. Inskip*, 8 Ves. 417. *Ex parte Morgan*, 10 Ves. 433.

[In the case of *Braybrooke v. Inskip*, 8 Ves. 435, the rule on this point is stated to be, that trust estates will pass under general words, unless it can be collected from expressions in the will, or the purposes or objects of the testator, that he did not mean they should pass. See also *ex parte Shaw*, 8 Sim. 159, *ex parte Marshall*, 9 Sim. 555; *Bainbridge v. Lord Ashburton*, 2 You. & Col. 347. *Lindsell v. Thacker*, 5 Jur. 804. In the last-mentioned case, the present Vice-Chancellor of England held, that trust estates would not pass by general words where there was something to show an intention of the testator that the estates devised should be beneficially enjoyed by the devisee; and on that ground he decided that a devise to the testator's wife, "for her sole use for ever," did not pass a dry legal estate, even in copyholds which the testator had surrendered to the use of his will. That a testator cannot intend to pass trust estates by a beneficial devise, seems indeed to be self-evident. Yet, in the cases of *Ex parte Shaw*, and *Bainbridge v. Lord Ashburton*, it was held, that a devise to a party "for his own use and benefit," passed estates of which the testator was a mere trustee; though it is difficult to conceive how a testator could more clearly show an intention to give a beneficial interest than by a devise to a party for his own use and benefit. The variety noticed in the text, as characteristic of former decisions, has certainly not been wanting in the more recent authorities. It might be conjectured, from some of these cases, that judges had been biased by a favourable inclination to a devise of trust estates, the object of it being to prevent the inconveniences arising from an intestacy as to such estates,—as for instance, a descent of the estate on an infant, or an alien,—if it were not for a late case, in which a general devise of trust estates, so far from meeting with indulgence and encouragement, was reprobated as improper and unlawful. See *Cooke v. Crawford*, 5 Jur. p. 723. It was said, that a trustee cannot delegate his trust, (which, indeed, is a well established rule, *Bradford v. Belfield*, 2 Sim. 264,) and that he ought not to do any act by which the legal estate may be separated from the office of trustee. It is true that a trustee cannot substitute another person in his own room, unless expressly authorised to do so by the instrument which created the trust. But wherever a trust is to be performed

not looking beyond the bare legal *estate, did not distinguish between the legal and beneficial inte- [*424]

by a party, his heirs, or assigns, there seems to be no good reason why he should not, with the object of relieving the trust estate, devise that estate; as this would only be to declare which of two classes specified in the instrument creating the trust, that is, his heirs, or his assigns, shall be his successors. In some cases, (as in that of *Cooke v. Crawford*), the trust is vested in the party originally nominated and his heirs only. But the devise in that case was general, of estates vested in the testator as trustee, and not merely of the particular estate in question; and as it is more usual to vest a trust in the trustee, his heirs, or assigns, than in him and his heirs only, and the practice of inserting a general devise of trust estates in a will was adopted with reference to usual circumstances of general convenience, the justice of visiting the estate of the testator with costs, (as threatened in *Cooke v. Crawford*), because, in one instance, the object of the devise had failed, owing to the peculiar terms of the trust, seems at least questionable. See the observations of the same learned judge as to the inexpediency of allowing property, clothed with a trust, to descend to an infant heir, in 11 Sim. 58. As the matter stands at present, however, it will be prudent either to omit the general devise of trust estates altogether from a will, or else to except estates, the trusts of which are to be performed by the testator and his heirs only.

It has been already observed, that a trustee cannot delegate his trust. "It is not correct, that into whatever hands the legal estates come, it would carry the trust with it: no persons, other than those mentioned, have authority to exercise the trust." *Cooke v. Crawford*. See also the observations of Sir William Grant in 16 Ves. 44. *Down v. Worrall*, 1 My. & Keen, 561. The only mode by which one trustee can be properly substituted for another, without the authority of the Court of Chancery, is by the appointment of a trustee, under a power contained in the instrument creating the trust. Such a power generally authorises the appointment of new trustees, in the place of any of the original trustees, or their successors, who may die or decline to act, or be desirous of retiring from, or become incapable or unfit to act in, the trusts; that is, either by way of substitution or of succession. A power of this description, if given to the trustees themselves, does not authorise a party nominated as trustee, but who declines to act, *ab origine*, to appoint a new trustee. *Sharp v. Sharp*, 2 Barn. & Ald. 405. But in a case where the power authorised the appointment of a successor or substitute, it was held that several persons might be appointed as joint successors or substitutes. *Sands v. Nugée*, 8 Sim. 130. In a later case, however, before Vice-Chancellor Knight Bruce, (*Re Clarke*, 8 May, 1843), in which there had been three trustees originally, and all had died, his Honor considered that a power of appointing new trustees, in the usual form, did not authorise the appointment of four. The principal ground of this decision, (which is opposed to the general practice of conveyances,) was, it seems, that an odd number of trustees might have been adopted intentionally, with a view to an easy adjustment of difference between them. This reasoning from a hypothetical intention, is not very satisfactory, especially as it is confined to one particular class of cases; viz. where the number of trustees was originally an odd one.

That a power of this description is directory only, and that in the event of the death of one of several joint-trustees the survivors may act, without supplying the vacancy in exercise of the power,—see *Attorney-General v. the Bishop of Lichfield*, 5 Ves. 825. *Doe v. Godwin*, 1 Dowl. & Ry. 259. In the case of *Palmer v. Wakefield*, 3 Beav. 227, where it was held that certain acts of the survivor of two trustees were breaches of trust, although they would have been valid if done by both trustees, the ground of the decision was, that the acts which constituted the breach of trust had commenced in the life-time of the other trustee, without his concurrence, and that he had never been introduced into, nor called upon to act in, the trusts. Where the deed or instrument contains no power of appointing new trustees, the Court of Chancery is empowered by the act 11 Geo. 4 & 1 W. 4, c. 60, sec. 22, to appoint new trustees

[*425-6] rest; and therefore considered all *property, to which the trustee had a legal right, *as HIS property; and as such passing by a devise *of [*427] his estate.' It is perhaps to be lamented, that the old rule, simple in itself, and not liable to misconstruction, has not prevailed.

The construction of a devise by a trustee, or mortgagee, of a legal estate, must properly be determined in a court of law; and by adopting the modern rule, courts of law must in some degree notice trusts, which in other instances they are careful to avoid. It can however be

on petition, and without a bill being filed; and this provision has been held to extend to a case where the instrument contained a power to appoint new trustees, but which did not apply to the circumstances. *In re Fauntleroy*, 10 Sim. 252.

Nor can a trustee, who has once accepted the trust, relieve himself from his obligations as trustee by any act of his own, as by transferring or releasing the trust-property to a co-trustee. *Wilkinson v. Parry*, 4 Russ. 272. A party, however, who has been nominated a trustee, has, of course, an option, before he has acted, to renounce the trust altogether; but for that purpose he must execute a simple deed of disclaimer. A conveyance by him of the trust estate to a co-trustee, would amount to an acceptance of the trusts. *Crewe v. Dicken*, 4 Ves. 97. *Niclson v. Wordsworth*, 2 Swanst. 365. *Begbie v. Crook*, 2 Bing. N. C. 70. *Doe v. Stagg*, 5 Bing. N. C. 564. *Urch v. Walker*, 3 My. & Cr. 702. And even where a trustee has acted he may be discharged from the trusts, on application to the Court of Chancery to appoint a new trustee in his place. Where such an application is made by a trustee in consequence of his being involved in difficulties and responsibilities, which he never contemplated, by the conduct of one of the cestui que trust, the costs of the application will be thrown upon the delinquent cestui que trust. *Coventry v. Coventry*, 1 Keen, 758. But a retiring trustee will have to bear the costs of an application to the court, where he does not assign any cause for declining to continue in the office. *Howard v. Rhodes*, 1 Keen, 581.

Where there is a devise to several trustees, and all renounce but one, that one can execute the trust. *Hawkins v. Kemp*, 3 East, 410. *Cooke v. Crawford*, ub. sup. But in the case of *Townsend v. Wilson*, 1 Barn. & Ald. 608, where a power of sale was given (by deed) to three trustees and their heirs, and one died, it was held that the survivors could not exercise it. See, however, some observations on this decision in *Hall v. Dewes*, Jac. 189, and in *Jones v. Price*, 11 Sim. 557. In the last mentioned case, a testator gave the residue of his estate to three trustees, and their respective heirs and assigns, in trust, that they or their respective heirs or assigns should sell; one of the trustees died, and the question was, whether the surviving trustees could make a good title. The Vice-Chancellor (of England) held that they could, and that the word "respective" must be rejected; observing, that there is of necessity a less degree of rigour in the construction of a will than what is required in the construction of a deed.

By stat. 2 Will. 4, c. 57, s. 3, the Court of Chancery is empowered to appoint new trustees of estates or funds belonging to a charity, where no trustees are existing, on petition of the attorney-general, or of the persons or body administering such charity, or of any person on behalf thereof. See *In re Fowey Charities*, 4 Beav. 225.]

⁹ *Marlow v. Smith*, 2 P. W. 198. *Ex parte Bowes*, cited in note, 1 Atk. 605. See recital in an act 9 Geo. 3, for vesting the estates of the Earl of Stafford in trustees to be sold.

understood, that when upon the face of the instrument, vesting the legal estate in the trustee, there is an express trust declared, a court of law may take notice that the person devising has the character of a trustee, without materially blending the jurisdictions of law and equity.

*But it is difficult to discover any principle, [*428] upon which a court of law can adopt the modern rule, in the case of a *constructive* trust. For instance, if A. contracts to sell a real estate to B., and dies before the conveyance is made to the purchaser, having, subsequently to the contract, devised all his *real* estates to C. in tail: a court of law, before it can decide that the estate contracted to be sold did not pass under the devise, must previously determine that A. is a trustee for B.¹

The preceding observations will apply to conveyances by trustees of all their real estates. It is in general considered, that a bargain and sale by commissioners of a bankrupt of all the bankrupt's real estate, does not at law pass property, of which he is trustee. It is observable, however, that the case of *Bennet v. Davies*² does

¹ In *Wall v Bright*, 1 Jac. & Walk. 494, it was held, that an estate, under contract for sale, passed by a devise of lands to trustees, in a case where, if the devise had been by a bare trustee, it would not have passed.

² 2 P. W. 316. [It does not appear to have been settled whether, if a trustee becomes bankrupt, the estate of which he is trustee passes to his assignees; but the opinion of Willes, C. J. was, that nothing vests in the assignees, even at law, but such real and personal estate of the bankrupt in which he had the equitable as well as legal interest, and which is to be applied to the payment of the bankrupt's debts: see *Scott v. Surman*, Willes Rep. 402, and cases referred to in note there. And this opinion is adopted by Lord Ellenborough in *Gladstone v. Hadwen*, 1 Mau. & Sel. 526. See also 1 Salk. 160. *Hunt v. Mortimer*, 10 Barn. & Cress. 47. *Lamb v. Vice*, 6 Mee. & Wels. 472, (in which it was laid down by Lord Abinger, that if the defendant had pleaded the bankruptcy of the plaintiff, it would have been a good replication that he was suing merely as trustee.) In the case of *Gardner v. Rowe*, 5 Russ. 258, the Lord Chancellor observed, that property held in trust is not the property of the bankrupt, and does not pass to his assignees. But the 79th section of the Bankrupt Act (6 Geo. 4, c. 16,) which empowers the Lord Chancellor to order the *assignees* of a bankrupt to convey or assign any real or personal estate which the bankrupt may be seized of, or entitled to, as trustee, to such person or persons as the Lord Chancellor shall think fit, upon the same trusts as such estate was subject to before the bankruptcy, seems to assume that estates vested in the bankrupt, as trustee, pass to his assignees. Under this section the court has made an order for the appointment of a new trustee. *Ex parte Saunders*, 2 G. & J. 132, (where the assignees were ordered to join with a solvent trustee in assigning and transferring the trust funds.) *Bainbridge v. Blair*, 1 Beav. 496. By the 26th section of the act establishing the Court of Bankruptcy, (1 & 2 Will. 4, c. 56,) the assignees have vested in them, without assignment, all such "personal estates and effects of the bankrupt as might have been assigned by the commissioners;"

[*429] not support *this doctrine. The words of the Master of the Rolls are, "as if the bankrupt had been a trustee for J. S., his bankruptcy should not IN EQUITY affect the trust estate;" and in that case, the legal estate, it was thought, passed to the assignee.

(5.) As courts of equity have been anxious to provide for the inconveniences arising at law from the alienation, incumbrances, and forfeitures of the trustee, so they are extremely cautious in confirming purchases made by him of the trust estate.(a) In the case of *Whelpdale v. Cookson*, [*430] *where a trustee for the sale of land purchased part of the trust estate for himself, Lord Hardwicke declared, that he would not let the purchase stand good, although another person, being the best bidder, bought it for him at a public sale; for he knew the dangerous consequence; nor was it enough for the trustee to say, You cannot prove any fraud, as it was in his own power to conceal it.⁵ We have already seen, that when

and by the 26th section of the same act, all such real estate of the bankrupt as by the Bankrupt Act (6 Geo. 4, c. 16) was directed to be conveyed by the commissioners to the assignees, is vested in the assignees without any deed of conveyance; so that the question as to what is vested in the assignees still remains as it was previously.] The case of *Sims v. Thomas*, 12 Adol. & El. 550, is an express decision on a similar point, arising under the Insolvent Act. It was there held that property in which an Insolvent debtor had no beneficial interest did not pass to his assignee, because the Insolvent Act (then in force) directed the estate and effects of the Insolvent to be assigned "in trust for the assignee and the rest of the creditors."

* 1 Ves. 9, S. C. This rule has been confirmed by many subsequent cases. See *Whitchcote v. Lawrence*, 3 Ves. 740. *Campbell v. Walker*, 5 Ves. 678. *Ex parte Reynolds*, ibid. 707. *Ex parte Hughes*, 6 Ves. 617. *Ex parte Lacy*, ibid. 625. *Lister v. Lister*, ibid. 631. *Ex parte James*, 8 Ves. 337. *Coles v. Trecothick*, 9 Ves. 234. [*Scott v. Davis*, 4 My. & Cr. 87.] Where a security is made by way of mortgage with a power of sale, the donee of the power is a trustee within the rule. *Downes v. Grazebrook*, 3 Mer. 200. In *Montesquieu v. Sandys*,

(a) *Carter v. Palmer*, 8 Cl. & Fin. 657; *Sidney v. Ranger*, 4 Beav. 118.

Pratt v. Thornton, 15 Shep. (29 Maine) 356; *Irwin v. Harris*, 6 Ired. Eq. (N. Car.) 215; *Walker v. Brunyard*, 13 S. & M. (Miss.) 723; *Wasson v. English*, 13 Miss. 176; *Allen v. Bryant*, 7 Ired. Eq. (N. Car.) 276; *Webb v. Dietrich*, 7 W. & S. (Penns.) 401; *Lamberton v. Smith*, 13 S. & R. (Penns.) 210; *Campbell v. Penn Life Ins. Co.*, 2 Wh. (Penns.) 53.

Such purchase voidable not void. *Liesenring v. Black*, 5 W. (Penns.) 304; *Prevost v. Gratz*, 1 P. O. O. (Penns.) 373; *Painter v. Henderson*, 7 Barr. (Penns.) 48; *Beeson v. Beeson*, 9 Barr. (Penns.) 279; *Costen's Appeal*, 1 Har. (Penns.) 292.

Must be avoided within a reasonable time. *Costen's Appeal*, ib.

May be ratified by cestui que trust. *Beeson v. Beeson*, 9 Barr. (Penns.) 280; *Painter v. Henderson*, 7 Barr. (Penns.) 48.

The rule that trustee cannot purchase from cestui que trust, does not extend to a purchase by a mortgagee from his mortgagor. *Knight v. Marjoribanks*, 2 Mac. & G. 10; 2 Hall & T. 308.

a trustee *renews a lease of which he is a trustee, the renewed lease shall be subject to the old trusts. [*431]

(6.) As the legal interest is vested in the trustee, he is consequently a necessary party to all suits commenced for and against the trust property. Generally, indeed, the *cestui que* trust should be also made a party; although the trustee may not only sue in his own name,⁴ but in some instances he should not bring his *cestui que* trust before the court on pain of incurring costs.⁵

(7.) It is, generally speaking, a rule, that a trustee releasing or compounding a debt due to the trust estate, must answer for the loss occasioned *by such release or composition.⁶ Yet this rule must always [*432] depend upon the particular circumstances of the case; for where a trustee, in releasing or compounding a debt, acts from prudential motives, and with a view to benefit the trust property, the courts will consider his conduct

18 Ves. 313, Lord Eldon observes, "There is no authority establishing, nor was it ever laid down, that an attorney cannot purchase from his client, what was not in any degree the object of his concern as attorney." [He must not be attorney in *hac re.* . Jones v. Thomas, 2 Yo. & Col. 520. The principle extends to all cases in which confidence is reposed by one party in the other. Dent v. Bennett, 7 Sim. 539. 4 My. & Cr. 269, S. C. Greenlaw v. King, 3 Beav. 49. Gillett v. Peppercorne, ib. 78.] See also Woods v. Downes, 18 Ves. 120. Hooper v. Goodwin, Cooper, 95, and note a 3 Mer. 209. In Sanderson v. Walker, 13 Ves. 601, Lord Eldon has also observed, "The principle has often been laid down, that a trustee for sale may be the purchaser in this sense; that he may contract with his *cestui que* trust, that with reference to the contract of purchase, they shall no longer stand in the relative situation of trustee and *cestui que* trust; and that the trustee having, through the medium of that sort of bargain, evidently, distinctly, and honestly proved, that he had removed himself from the character of trustee, his purchase may be sustained." [See also Grover v. Hungell, 3 Russ. 432.]

In order to rescind a purchase made by the trustee for sale, the application must be made within a reasonable time, (Price v. Byrn, cited 5 Ves. 681, and the arguments of the Master of the Rolls, ibid. 682. 11 Ves. 226. Gregory v. Gregory, Cooper, 201; [see also Champion v. Rigby, 1 Russ. & My. 539];) except in the case of a body of creditors, against whom it is said, that laches does not apply (Anon. in Exch. cited 6 Ves. 632) and the case of a charity, Attorney-General v. Lord Dudley, Cooper, 146. [And where a reconveyance is required by the *cestui que* trust, an allowance will be made to the trustee for substantial repairs and lasting improvements. Trevelyan v. White, 1 Beav. 588. Williamson v. Seaber, 3 Yo. & Col. 717.]

In Sir George Colebrook's case, cited 6 Ves. 622, the Lord Chancellor Thurlow said, that in case of a purchase by a trustee or assignee for the benefit of creditors, the confirmation of the purchase by the majority of the creditors will not bind the individual creditors who did not confirm.

⁴ 1 Har. Cha. Prac. 247.

⁵ Ibid. Toth. 285.

⁶ 2 Atk. 48. [Wood v. White, 4 My. & Cr. 483.]

⁷ See Jevon v. Bush, 1 Vern. 342. George v. Chansey, 1 Cha. Rep. 125.

not only excusable, but in many instances, laudable.⁸ On the other hand, where a trustee buys in an incumbrance for less money than is actually due, the trust estate shall receive the benefit of the composition.⁹

(8.) A trustee cannot (without an express power for that purpose) alter the nature of the trust property^{1(a)} either by converting land into money, investing money in the purchase of land,² or by taking a lease for lives instead of renewing a lease for years,³ so as to vary the right of succession to such property; unless it be under particular circumstances, and evidently for the benefit of the trust estate.⁴

(9.) As the trustee cannot prejudice *cestui que trust* by doing what his trust does not authorise, so he cannot, in general, injure him by omitting to do what his office requires him to perform.⁵ Therefore, where an entry was made and a fine levied by a stranger during the infancy of *cestui que trust*, and the trustee neglected to enter for the purpose of avoiding the fine, the Court of Chancery determined that the infant should not suffer for the laches of his trustee.⁶ The exception to the rule is in the case of a purchaser or creditor.⁷

(10.) When money is invested in the purchase of stock in the names of trustees, they have no power to change the security,^(b) unless they are expressly allowed so to do by the trust; and therefore, if they take upon themselves to use a discretionary power in this respect, they

⁸ Blue v. Marshall, 3 P. W. 381.

⁹ 3 P. W. 261, note A. Darye v. Hall, 1 Vern. 49. Morrett v. Pasko, 2 Atk. 54.

¹ See Earlam v. Saunders, Amb. 241.

² Rook v. Warth, 1 Ves. 461. Tullit v. Tullit, Amb. 370.

³ Witter v. Witter, 3 P. W. 99. See Milner v. Harewood, 18 Ves. 274.

⁴ Terry v. Terry, Prec. Cha. 273. Vernon v. Vernon, cited 3 Brown, C. C. 513. Inwood v. Twine, Amb. 417.

⁵ 3 P. W. 215. 2 Atk. 406. No fraudulent or unnecessary delay, on the part of trustees, shall affect the interests of third persons. Vide 1 Merl. 433, in Bernard v. Montague.

⁶ Allen v. Sayer, 2 Vern. 368.

⁷ Note G. 3 P. W. 310. Vide ante, 316.

^(a) Bonsall's Appeal, 1 W. (Penna.) 294; Kauffman v. Crawford, 9 W. & S. (Penna.) 134.

Shall not deal with subject of trust. Conger v. King, 11 Barb. Sup. Ct. (N. Y.) 356; see Stuart v. Kissam, ib. 271.

If he deposits money in bank to his private account, he is liable for its loss. In re Stafford, ib. 383.

^(b) Murray v. Feinour, 2 Md. Ch. Decis. 418.

are liable to answer for any loss which may happen to the trust fund ; it being in the election of the *cestui que trust* either to have the individual stock restored to him, or the money for which it was sold by the trustees.⁸ But while the original *stock remains vested in [*434] their names, or if they purchase of a power re- served to them, they will not be answerable for [*435] *the falling of such original stock in the one in- stance, nor of the new fund in the other.⁹ But it is to be observed, that when there is a decay of the trust funds, all the *cestui que trust* must suffer equally ; therefore if the trustee, in that case shows any preference, he must answer for it out of his own estate.¹ In a case,²

* *Harrison v. Harrison*, 2 Atk. 121. *Bostock v. Blakeney*, 2 Bro. 653. *Pocock v. Reddington*, 5 Ves. 794. Note, that an executor, investing his testator's money in the purchase of Three per Cent. Consolidated or Reduced Bank Annuities, will not be liable in consequence of the fall of that stock. *Ex parte Champion*, cited 3 Bro. 434. *Howe v. Earl of Dartmouth*, 7 Ves. 137. *Holland v. Hughes*, 16 Ves. 111. "The rule is never to permit a trustee or executor, after a decree, to lay out money on mortgage, without a previous application to the court." Per Lord Eldon in *Widdowson v. Duck*, 2 Mer. 494.

[The Three per Cents. is the fund in which the Court of Chancery holds that trustees ought to make investments, when no other investment is pointed out by the instrument creating the trust; 16 Ves. 114. A mortgage is only a proper investment where there is an express direction or power to invest on real security; (*Pride v. Fooks*, 2 Beav. 430); and in the case of such a direction or power, an advance under it to the extent of two-thirds of the value of the property comprised in the security is within the rule of ordinary prudence, and as such sanctioned by the Court of Chancery. But this is with reference only to property of a permanent value, as freehold land. The same rule does not apply to property in houses, which fluctuates in value, and is always deteriorating; nor of course to property the value of which is increased by circumstances which are of a temporary nature. *Stickney v. Sewall*, 1 My. & Cr. 8. *Wyatt v. Sharratt*, 3 Beav. 498. And it is apprehended that a power to invest on real security does not authorise an investment on mortgage of leaseholds for years; since independently of the question of permanence of value, a lease for years is not real estate, but merely a chattel.

Where there is a direction to invest in real securities in England or Wales, the Court of Chancery will not accede to the investment of a fund in court on a mortgage of land in Ireland, under the act of 4 & 5 Will. 4, c. 29, which authorises persons directed or empowered to lend money on real securities in England, Wales or Great Britain, to lend the same on real securities in Ireland. *Stuart v. Stuart*, 3 Beav. 430.

Where trustees are empowered to invest or advance money, or do any such act, with the consent of a third person, such consent must precede or accompany the act; and a subsequent approbation will not be sufficient. 3 Swanst. 80, n. *Bateman v. Davis*, 3 Mad. 98. *Greenham v. Gibbeson*, 10 Bing. 363.]

* *Jackson v. Jackson*, 1 Atk. 513. Anon. 1 P. W. 648. The discretionary power of trustees to vary securities is not controlled by the Court of Chancery, unless ruinously exercised. *De Manneville v. Crompton*, 1 Ves. & B. 354.

¹ *Tilsey v. Throckmorton*, 2 Cha. Ca. 132.

* *Trafford v. Boehm*, 3 Atk. 444. [In the case of *Ex parte Chaplin*, 3 Yo. & Col. 397, it was held, that an investment in Exchequer bills was not authorised by a direction to invest in "Government securities."]

where a power was given to trustees to invest moneys *in government funds, or other good securities*, it was said by Lord Hardwicke, that neither South-sea stock nor Bank stock,³ were considered as a good security; because it depended upon the management of the governors and directors, and was subject to losses; but that it was different as to South-sea and Bank annuities. (a)

(11.) Where a trust was created by will for the maintenance of infants, and the trustee, in the lifetime of the father, applied the interest of the trust fund for that purpose, Lord Thurlow said, that it was contrary to all rules that the interest vested in the children should be [*436] applied for their *maintenance in the lifetime of the parent; for that would amount to a gift to the parent of so much as should be necessary for the maintenance.⁴ This rule applies only to cases where the parent has the ability to provide for his children.⁵ But a trustee may in some instances exceed the letter, if he conform to the spirit of the trust. Thus in a case⁶

³ Not a *bond*. *Wilkes v. Steward*, Coop. 6. *Langston v. Ollivant*, ibid. 33. [3 Mad. 62. 3 Swanst. 80, n.]

⁴ *Andrews v. Partington*, 3 Bro. C. C. 60. [*Kekewich v. Langston*, 11 Sim. 291. But there is a distinction between cases in which the property of the children is derived from the bounty of a stranger, and those in which they are entitled to it under the marriage settlement of their parents. *Mundy v. Earl Howe*, 4 Bro. C. C. 223. *Stocken v. Stocken*, 4 Sim. 152, 2 My. & Keen, 489, 4 My. & Cr. 95. *S. C. Meacher v. Young*, 2 My. & Keen, 490. In the latter case the father is entitled to an allowance for the maintenance of his children, provided there is a distinct and positive trust to apply the income for such maintenance; but not where there is merely a power. *Thompson v. Griffin*, 1 Cr. & Phil. 317.]

⁵ See *Butler v. Butler*, 3 Atk. 60, and the note to the last ed.

⁶ *Franklin v. Green*, 2 Vern. 137. *Warr v. Warr*, Prec. Cha. 213. *Swinnock v. Crisp*, 2 Freem. 78. But see 4 Ves. 368, in *Lee v. Brown*. [It is the general rule of the court never to permit trustees, of their own authority, to break in

(a) *Munch v. Cockerell*, 5 Myl. & Cr. 178; *Phillipson v. Gatty*, 13 Jur. 318; *Jones v. Lewis*, 13 Jur. 877; *Robinson v. Robinson*, 11 Beav. 371; *Man v. Leith*, 16 Jur. 302.

Held liable for investment in bank stock, which failed. *Ackerman v. Emott*, 4 Barb. Sup. Ct. (N. York) 626; *Hemphill's Appeal*, 6 Har. (Penns.) 303.

Only protected in investments in real or government securities, or according to the order of the court. *Hemphill's Appeal*, 6 Har. (Penns.) 303.

Personal security on the stock of a private company held bad. *Nyce's Estate*, 5 W. & S. (Penns.) 254; see *Rush's Est.*, 2 Jones, (Penns.) 375.

Will not order investment, where the jurisdiction of the court does not extend. *Bush's Est.*, ib.

An authority in a will to invest a residue in good private securities, does not authorize the trustee to mix up the property with his own estate. *Westover v. Chapman*, 1 Col. 177.

where a trustee of money for an infant, payable at twenty-one, or marriage, with a power of maintenance in the mean time, paid part of *the principal for placing the infant out as an apprentice; the court, upon the death of the infant under twenty-one, unmarried, allowed the trustee what he had so paid, notwithstanding the money was limited over upon the event which had happened. I may here add the case,⁷ where a sum of money was directed to be laid out in the purchase of freehold lands only, and the court dispensed with the strict direction, and approved of the purchase of a college lease at the same time with the freehold. The court seemed inclined to act in the same manner, where money was directed to be laid out in the purchase of land within a particular district.⁸

In *Gaskell v. Harman*, 11 Ves. 489, 507, the Lord Chancellor acceded to the principle, that no fraudulent or unnecessary dilatory dealing by trustees shall affect third persons; and in *Bernard v. Montague*, 1 Mer. 422, where there was a trust to raise certain sums out of real estate, out of the rents and profits, or by mortgage, the Master of the Rolls observed that, in creating the alternative, it must be taken that the testator did not give to the trustees a power which they were at liberty to exercise according to their own pleasure.⁹

*In the common case, where there is a trust to raise money for portions, &c. by mortgage, or by and out of the annual rents and profits, and the estate, subject to the payment thereof, is settled upon A. for life, with remainders over, it is usual to raise the money by mortgage, by which means the money becomes a charge upon the inheritance, and the tenant for life is upon the capital of a fund belonging to an infant, either for his maintenance or advancement. *Walker v. Wetherell*, 6 Ves. 473. *Ex parte M'Key*, 1 Ball & Beak. 405. *Palmer v. Wakefield*, 3 Beav. 227. The court itself will rarely break in upon the capital for the mere purpose of maintenance, though frequently for the purpose of putting the child out in life. 6 Ves. 474. *Ex parte Green*, 1 Jac. & Wal. 253. It seems, however, that the court would not allow a trustee to be called to account for doing, without application, an act which the court would have approved. 4 Ves. 369. 3 Beav. 233.]

⁷ *Gosselin v. Dodwell*, cited 3 Atk. 414.

⁸ *Maynwaring v. Maynwaring*, 3 Atk. 413. So where the time appointed for sale by trustees has elapsed. *Witchcot v. Souch*, 1 Cha. Rep. 183. See *Moseley v. Moseley*, Finch, 53.

⁹ [Lord *v. Godfrey*, 4 Mad. 455.]

obliged to keep down the interest; for it would be a hardship on the tenant for life, if the money were raised at his expense, out of the annual rents and profits, in favour of those in remainder.

(12.) Against accidental losses, which happen to the trust estate, the courts are anxious to relieve the trustee; if such losses do not happen through his own neglect or default. (a) If the trustee is robbed of the trust-money, the courts consider whether he has kept it as he would his own money.¹ Does his banker fail, whereby a loss accrues to the trust-fund? Equity inquires whether the banker was in credit at the time the money was paid into his hands?² Does an agent of the trustee become [*439] insolvent? The question is, whether *he was in good circumstances at the time of his nomination.³

(13.) When trustees are appointed to preserve contingent remainders, if they join in any conveyance in order to destroy those remainders, this shall in general be deemed a breach of trust,⁴ whether the settlement be voluntary or not.⁵ In some particular instances, however, the courts have ordered the trustees to make conveyances in order to defeat the contingent estates; but it would be prudent for trustees to receive the directions of a court of equity before they agree to destroy those estates which they are appointed to preserve.⁶

¹ Morley v. Morley, 2 Cha. Ca. 2. Jones v. Lewis, 2 Ves. 240. [Massey v. Banner, 1 Jac. & Wal. 241.]

² Knight v. Plymouth, 3 Atk. 480. Horsley v. Chaloner, 2 Ves. 85. Ex parte Belchier, Amb. 219. But see Rider v. Bickerston, 5 Ba. Ab. 401, pl. 12. [Where the money is allowed to remain in the banker's hands for any length of time, the inquiry would be, whether it was necessary for the purpose of the trust to have a balance in the hands of bankers. Moyle v. Moyle, 2 Russ. & My. 710. Darke v. Martyn, 1 Beav. 525.]

³ Anon. 12 Mod. 560. "If one devise to trustees, and by express clause therein, give them power to appoint agents to manage the land, and they appoint one then solvent and good, though afterwards he prove insolvent, they shall not answer for him; *secus* if he were not solvent at the time at which he was nominated. But if there were no such direction or power in the will, the trustees are bound to answer for their agents at all events."

⁴ Pye v. George, 2 Salk. 680. 1 P. W. 128, S. C. Else v. Osborn, 1 P. W. 388. Woodhouse v. Hoskins, 3 Atk. 22.

⁵ Mansell v. Mansell, 2 P. W. 678. Symance v. Tatton, 1 Atk. 613.

⁶ The cases upon this subject are collected in the case of Moody v. Walters, 18

(a) Gray v. Lynch, 8 Gill. (Md.) 403.

Advice of counsel is not sufficient in case of failure of trustee to perform his duty properly, he should have applied to the court. Freeman v. Cook, 6 Ired. Eq. (N. Car.) 373.

(14.) But whenever cestui que trust is entitled [§ 440] *to an estate tail, which he alone might have barred by an equitable recovery; then it will not be a breach of trust, if the trustee join with him in a conveyance to bar the entail, and to pass the legal estate; for his joining in this case is nothing more than what he is compellable to do.⁷

(15.) It is said to be a rule in Chancery, that if lands are vested in trustees in fee-simple, in trust for one, and the heirs of his body, with remainder over, the trustees are not to convey an estate in fee-simple to the tenant in tail, but an estate-tail; although such tenant in tail will have it in his power to bar the entail, with the remainder over by a recovery.⁸ So if a sum of money be agreed

Ves. 283; and the above doctrine is there much discussed. See *Biscoe v. Perkins*, 1 Ves. & B. 485. [A bare trustee is not protector of a settlement, under the act for the abolition of fines and recoveries (3 & 4 Will. 4, c. 74,) except in the case of a settlement made before the passing of the act, sec. 31.]

⁷ 1 Eq. Ab. 384, (E.) note A. *Carteret v. Carteret*, 2 P. W. 134. A conveyance was made to a purchaser and his trustee, and the heirs of the purchaser. The purchaser by will devises to B. in tail, with remainders over. The trustee survived the purchaser; so that B. could not suffer recovery without the aid of trustee. It was decreed that the trustee should convey to B. in tail, with remainders over, according to the will. *Young v. Leigh, Cary*, 95, 20 Eliz. In *Carteret v. Carteret*, the court refused to compel the trustee to join in making a tenant to the precipe; but directed the trustee to convey the legal estate tail to the tenant. [By the act for the abolition of fines and recoveries, (3 & 4 Will. 4, c. 74,) it is declared, that the protector of a settlement shall not be deemed to be a trustee in respect of his power of consenting to bar the entail, and that a court of equity shall not control or interfere to restrain the exercise of his power of consent, nor treat his giving consent as a breach of trust; sec. 36.]

⁸ 1 Eq. Ab. 395. [When a trustee in whom lands are vested in trust for another and his heirs, is called upon by his cestui que trust to convey the legal estate, and objects to do so without the direction of the Court of Chancery, he will have to pay the costs of a suit instituted against him to compel a conveyance, even although his objections are founded upon an alleged doubtful construction of the terms of the instrument under which the cestui que trust claims, provided the legal effect of such terms has been settled by decided cases. *Willis v. Hiscox*, 4 My. & Cr. 197. But parties calling on trustees to part with their estate on the ground that the trusts have terminated, are bound clearly and satisfactorily to show the fact to the trustees. *Holford v. Phipps*, 3 Beav. 434. And in the case of an old trust, creating successive limitations of equitable interests, owing to the failure of some of which the party calling for the conveyance claimed to be entitled, it was held that the trustees, before they made the conveyance, might require the equitable title to be ascertained, and the conveyance to be settled in the Court of Chancery. *Goodson v. Ellisson*, 3 Russ. 583. The general rule appears to be that trustees will be called on to pay costs in these cases, if they refuse to act merely from obstinacy and caprice, and without assigning a reasonable ground for their refusal. *Taylor v. Glanville*, 3 Mad. 178. *Jones v. Lewis*, 1 Cox, 199. See also *Wilson v. Wilson*, 2 Keen, 249. An executor to whom leaseholds are bequeathed in trust to sell, will not, however, be compelled to part with the legal estate without an indemnity. *Cochrane v. Robinson*, 11 Sim. 378.

That joint trustees who are made defendants in a suit, and who serve in their

[*441] *to be laid out in land, and the lands to be settled in tail, with remainders over; the settlement shall be made accordingly, and the money shall not be paid to the tenant in tail; because there is a chance of his death before a recovery should be suffered, which can only be done in term-time.¹ *But if the remainder in fee had in this case been limited to the tenant in tail, then it seems that the Court of Chancery might have directed the money to be paid to him; because he might have barred the limitation by a fine, which may be levied in vacation time, as well as in term.¹

(16.) The courts of equity look upon trusts as honorary, and not undertaken upon mercenary motives;² and therefore in the case of *Robinson v. Pett*,³ Lord Talbot defences for the purpose of putting money in the pockets of third parties, at the expense of the parties beneficially interested, will only be allowed one set of costs, see *Gaunt v. Taylor*, 2 Beav. 346. But circumstances may justify joint trustees in defending separately. *Aldridge v. Westbrook*, 4 Beav. 212.]

¹ *Short v. Wood*, 1 P. W. 470, and the cases cited in note 1, to *Collett v. Collett*, 1 Atk. 12, 3rd ed. [In the last edition of this work, the provisions of the act 40 Geo. 3, c. 56, entitled, "An Act for Relief of Persons entitled to Entailed Estates to be purchased with Trust Moneys," were here cited; and the following observations were added.]

It should seem that, from the time of the order, the fund becomes converted into personality.

The act seems to meet the case of a husband and wife successively tenants for life. But I doubt whether a feme covert entitled to a jointure rent-charge is within the act. The rent seems to be an incumbrance and not a particular estate.

[The act of 40 Geo. 3, c. 56, was repealed by the act 7 Geo. 4, c. 46, which was itself repealed by 3 & 4 Will. 4, c. 74, (the act for the abolition of fines and recoveries,) s. 70. By the last-mentioned act, money subject to be invested in the purchase of lands, is, for all the purposes of that act, to be treated as the lands to be purchased (s. 71); and consequently a disentailing assurance of such money may be made either in term, or in vacation time.

As to the disposition by a married woman of her interest, of whatever description, in money subject to be invested in the purchase of lands, see the act, and also p. 327, ante, note (9.) As to the mode of proceeding under the act, where the fund is in court, see *In re Smythe*, 3 My. & Keen, 249.]

¹ See cases supra. 3 Atk. 447.

² 2 Atk. 60, 406.

³ 3 P. W. 251. S. C. See *French v. Baron*, 2 Atk. 120, note 3. In the matter of *Annesley*, Amb. 78. *Chambers v. Goldwin*, 5 Ves. 834. 9 Ves. 254.

[Where a solicitor is a trustee, costs out of pocket only will be allowed, (*In re Sherwood*, 3 Beav. 338,) even if he have a partner, and the business of the trust be transacted by the partnership, (*Collins v. Carey*, 2 Beav. 128,) and although the instrument creating the trust contain a direction for payment out of the moneys, of all expenses, disbursements, and charges to be incurred, sustained, or borne by the trustee in professional business, journeys, or otherwise; and of all reasonable costs, charges, and expenses which he might sustain or be put unto. *Moore v. Frowd*, 3 My. & Cr. 46. It was held, in the last-mentioned case, that there was nothing in the provisions peculiarly applicable to the case of the solicitor being also trustee. But of course a solicitor, who is trustee, will be entitled even to his own professional charges, under an express direction to that effect. 3 Beav. 341.

said, it was an established *rule that a trustee [*443] should have no allowance for his care and trouble in the management of the trust ; for if, on those pretences allowances were to be made, the trust might be loaded, and rendered of little value ; that a great difficulty might attend in settling and adjusting the *quantum* of such allowance, especially as one man's time might be more valuable than that of another ; and that it could be no hardship upon any trustee ; for it was at his option either to accept or refuse the trust.(a) But if a trustee come in a fair and open manner, and tell cestui que trust that he will not act in such a troublesome and burdensome office without further compensation given by cestui que trust, over and above the terms of the trust, and such terms be contracted for between them, this contract, Lord Hardwicke *observed,⁴ would not perhaps be set aside, [*444] though there was no precedent wherein such a bargain had been confirmed.

But though a trustee be not allowed for his trouble, it seems that if he employ a bailiff to manage the trust estate, he must be allowed for the employment of, and payments made to, such bailiff.⁵

That a commission-agent is not entitled to charge for business done by him as trustee, see *Sheriff v. Axe*, 4 Russ. 33. But where a testator directed that his trustees should be entitled to receive all costs, charges and expenses for loss of time ; one of the trustees who was a land-surveyor, and superintended the management and sale of the trust estates, was held to be entitled to compensation for loss of time. *Willis v. Kibble*, 1 Beav. 559.]

⁴ Atk. 60. [It is clear that such a contract would now be held valid. - 2 Swanst. 453. 3 My. & Cr. 49. 3 Beav. 341.]

⁵ *Bonithorn v. Hockmore*, 1 Vern. 316. *Forest v. Elwes*, 2 Mer. 68. [*Henderson v. M'Iver*, 3 Mad. 275. *Wilkinson v. Wilkinson*, 2 Sim. & Stu. 237. But the employment of an agent will only be allowed under special circumstances. *Weiss v. Dill*, 3 My. & Keen, 26.]

(a) The American rule is otherwise ; a trustee is entitled to an allowance for his services, as well as for the expenses of the trust. *Burr v. McEwen*, 1 Bald. (Penns.) 154 ; *Prevost v. Gratz*, 3 W. C. C. R. (Penns.) 434 ; *Nathans v. Morris*, 4 Wh. (Penns.) 389 ; *Spangler's Est.*, 9 H. (Penns.) 335 ; *Sherrell v. Sherford*, 6 Ired. Eq. (N. Car.) 228 ; *Wylby v. Collins*, 9 Geo. 228 ; *Bentley v. Shreve*, 2 Maryland Ch. Decis. 215 ; *Ingram v. Kirkpatrick*, 8 Ired. (N. Car.) 62 ; *Clark v. Hoyt*, 8 Ired. Eq. (N. Car.) 222.

Only when trust is faithfully executed. *Stehman's Appeal*, 5 Barr, (Penns.) 413.

When there is no cause for discharging a trustee and relieving him from the duties of his trust, other than his own wish, the court will compel him to pay the costs of his petition, and of the appointment of his successor, and he will not be allowed any commissions on the capital of the trust property, in passing his accounts and transferring to the new trustee. *In re Jones*, 4 Sandf. Ch. (N. Y.) 615 ; see *In re DePeyster*, 4 Sandf. Ch. (N. Y.) 511.

(17.) Notwithstanding trustees are not allowed anything for their trouble and care in the management of the trust estate, it is reasonable that they should be allowed all costs and expenses which may be incurred in the execution of the trust, and the discharge of their office ; provided there be no mismanagement, nor breach of trust.* Therefore Lord King said,[†] it was a rule that a trustee ought to be saved harmless by cestui que trust, as to all damages relating to the trust. Thus, where a trustee has honestly and fairly, without any possibility of being a gainer, laid down money, by which the cestui que trust was discharged from being liable to pay a [*445] greater sum, or from a plain *and great hazard of being so, the trustee ought to be repaid.[‡]

(18.) If a trustee, said Lord Hardwicke,[§] err in the management, and be guilty of a breach of trust, yet if he quit it with the approbation of cestui que trust, the breach ought in the first place to fall on the estate of cestui que trust who consented to it; for the courts are ever anxious to deliver the trustee from any misapplication of the trust-money.

And lastly : where there are two or more trustees, the rule is, that each of them shall be charged for his own wilful neglect, default, or breach of trust only ; and that the innocent trustee shall not suffer for the misconduct of his co-trustee. Therefore it has been decided, that a trustee who has joined in a voucher for the whole trust-money, but has in truth only received a part of it, shall be charged for so much only as has actually come to his hands ;[¶] unless indeed fraud, or, what is tantamount to it, gross negligence, should appear in the transaction.^{¶(a)}

* *Hithersell v. Hales*, 2 Cha. Rep. 158, and Finch. Rep. 361. 12 Mod. 560. 2 Cha. Ca. 138.

† 2 P. W. 455.

‡ *Balsh v. Hyham*, 2 P. W. 453.

§ 3 Atk. 444. [11 Ves. 324. 1 Mer. 712. 1 Beav. 125.]

[¶] See *Leigh v. Barry*, 3 Atk. 584, note 2, last ed.

^{¶(a)} *Bridgm. 38. Keble v. Thompson*, 3 Bro. C. C. 112. See *Lord Shipbrook v. Lord Hinchinbrook*, 11 Ves. 252. 16 Ves. 477, S. C.

[On the question of the liability of a trustee for the acts of his co-trustee, see *Sadler v. Hobbs*, 2 Bro. C. C. 114. *Fellows v. Mitchell*, 1 P. W. 81. *Churchill v. Lady Hobson*, ib. 241. *Belchier v. Parsons*, Ambl. 219. *Leigh v. Barry*, 3

(a) *Jones' Appeal*, 8 W. & S. (Penns.) 143; *Still's Appeal*, 10 Barr, (Penns.)

Atk. 584. *Chambers v. Minchin, 7 Ves. 186. Shipbrook v. Lord Hinchingbrook, 11 Ves. 253. S. C. 16 Ves. 477. Brice v. Stokes, 11 Ves. 319. [**446] Underwood v. Stevens, 1 Mer. 717. Walker v. Symonds, 3 Swanst. 63. Booth v. Booth, 1 Beav. 125. Terrell v. Matthews, 5 Jur. 1074. From the cases on this subject it is to be collected that, if by any act or agreement of a trustee, money gets into the hand of his co-trustee, they will both be answerable, except in the single case of trustees joining in a receipt for trust-moneys, when the trustee who actually receives the money is alone chargeable, unless the other trustee has been guilty of concomitant negligence. And see Gregory v. Gregory, 2 Yo. & Col. 316. Terrell v. Matthews, 5 Jur. 1075. Meyer v. Montrion, 4 Beav. 343. It also appears that a trustee who stands by, and sees a breach of trust committed by his co-trustee, becomes responsible for that breach of trust. 1 Beav. 125.

With respect to the inefficacy of the usual trustees' indemnity clause, in protecting the trustees from any liability to which they would be subject in the absence of any such clause, see Bow v. Cook, MClel. 168. Hanbury v. Kirkland, 3 Sim. 265. Moyle v. Moyle, 2 Russ. & My. 710.

Not only a trustee himself, but solicitors, or other persons, knowingly inducing a trustee to commit a breach of trust for their own benefit, will be considered as partakers in the breach of trust. Fyler v. Fyler, 3 Beav. 550. And where the breach of trust has been committed at the request or with the concurrence of a person who has a beneficial interest in the property, and possesses a full knowledge of the circumstances, his interest is liable to indemnify the trustees. Brice v. Stokes, 11 Ves. 324. Underwood v. Stevens, 1 Mer. 712. Booth v. Booth, 1 Beav. 125. But it is otherwise if the concurring cestui que trust be a married woman, Hopkins v. Myall, 2 Russ. & My. 86; unless her interest be settled to her separate use, Crosby v. Church, 5 Jur. 50.

That trustees are bound to do any act for relieving the trust estate, which a beneficial owner would be justified in doing, see Rowley v. Adams, 4 My. & Cr. 542.]

153; State v. Guilford, 18 Ohio, 500; Latrobe v. Tiernan, 2 Md. Ch. Decis. 474; see Griffin v. Macaulay, 7 Gratt. (Virginia) 476.

Trustees must all join in receipts or conveyances. Ridgely v. Johnson, 11 Barb. Sup. Ct. (N. Y.) 527.

So held in case of private trusts, but that in public trusts a majority is sufficient. Hill v. Josselyn, 13 S. & M. (Miss.) 597.

Payment to one of two trustees binds both. Husband v. Davis, 20 Law J. Reps. 118.

APPENDIX.

No. I.

Proviso shifting the Use upon Neglect or Refusal to take a Name, and bear certain Arms.

PROVIDED always and it is hereby agreed and declared between and by the said parties hereto, that every husband of each of them the said Eliz. L., Letitia L., and Arabella L., and of each of their daughters, who under or by virtue of the limitations hereinbefore contained, or of these presents, shall become entitled to the actual possession or receipt of the rents and profits of the said manors and other hereditaments expressed to be hereby granted and released, shall apply for, and endeavour to obtain, an act of parliament, or proper license from the crown, or take such other ways or means as may be requisite or proper to enable or authorise him to take and use the surname of L. only, and no other surname, and to quarter the arms of L. with his own family arms within the time hereinafter mentioned, that is to say, if the wife of such husband shall be entitled to the actual possession or receipt of the rents *and profits of the said manors [*448] and other hereditaments at the time of her marriage; then within the space of one year after such marriage; but if the wife of such husband shall not be entitled to the actual possession or receipt of the rents and profits of the said manors and other hereditaments at the time of her marriage, then within one year after she

shall so become entitled as aforesaid ; and also, that every other person, who under or by virtue of the limitations hereinbefore contained, or of these presents, shall be entitled to the actual possession or receipt of the rents and profits of the said manors and other hereditaments expressed to be hereby granted and released, shall within one year after he shall so become entitled to the possession or receipt of the rents and profits of the said manors and other hereditaments, apply for, and endeavour to obtain, an act of parliament or proper license from the crown, or take such other ways or means as may be requisite or proper to enable or authorise him to take and use the surname of L., and no other surname, and to quarter the arms of L. with his own family arms ; and that in case any such person or persons shall refuse or neglect to take such surname and arms, and to take and use the steps or means which shall be requisite or proper to enable and authorise him or them so to do, by the space of one year to be computed as aforesaid, then if the person so refusing or neglecting shall be the husband of either of them the said Elizabeth L., Letitia L., and Arabella L., *the limitation hereinbefore contained to the use of such of them, whose husband shall so refuse or neglect, and to the use of her husband after her death, shall cease, determine, and become absolutely void ; and if such person so refusing or neglecting shall be the husband of any daughter of them the said Elizabeth L., Letitia L., and Arabella L., the limitation hereinbefore contained to the use of the daughter, whose husband shall so refuse or neglect, and her heirs male, shall cease, determine, and be absolutely void : and in case the person so neglecting or refusing shall be any other than such husband as aforesaid, the limitation hereinbefore contained to the use of such person and the heirs male of his body, shall cease, determine, and be absolutely void ; and the said manors and other hereditaments shall in either of such cases immediately thereupon go to the person next beneficially entitled in remainder under the limitations hereinbefore contained, in the same manner as if the person or persons whose estate or estates shall so cease, determine, and become void, being tenant or ten-

ants for life, was or were dead, or being tenant or tenants in tail, was or were dead, without issue inheritable under such entail, without prejudice nevertheless to any portion or portions, lease or leases, which previously to such cesser or determination shall have been charged, made, or created, by virtue, or under the exercise of, any of the powers hereinafter contained. And it is hereby further agreed and declared between and by the said parties hereto, *that the cesser or determination [*450] of any estate or estates of any tenant or tenants for life, by virtue of the proviso hereinbefore contained, shall not operate to exclude, prevent, or prejudice any of the contingent remainders hereinbefore limited to the son or sons, daughter or daughters of such tenant or tenants for life, or any other person or persons ; but that the remainder hereinbefore limited to the said trustees and their heirs during the life of every such tenant for life, shall after such cesser or determination, take effect and continue for preserving such contingent remainders, and giving them effect as they may arise ; and that immediately from or after such cesser or determination of such preceding estate or estates for life or lives, and during the suspense and contingency of such then expectant remainder, the said A. and B. and their heirs, shall receive, pay, and apply the rents and profits of the said manors and other hereditaments which would belong to such tenant or tenants for life, if such cesser or determination had not taken place, unto the person or persons for the intents and purposes, and in the manner to, for, and in which the same rents and profits would be, or would have been payable or applicable, under, or by virtue of, the limitations and provisoies hereinbefore contained, in case such tenant or tenants for life was or were actually dead ; so that from and immediately after such cesser or determination the issue of each such tenant or tenants for life, entitled for the time being under the limitations aforesaid to the *said manors and other [*451] hereditaments in remainder, immediately expectant upon the decease of such tenant or tenants for life, may be entitled to the rents and profits of the said manors and other hereditaments for his and their own use and

benefit during the life of the parent, as if such parent were dead: and that in case no such issue be in existence, then during the vacancy or contingency of such issue, the person next beneficially entitled, for the time being, under the limitations aforesaid, to a vested remainder in the said manors and other hereditaments expectant upon the decease of such tenant or tenants for life, and failure of his, her, or their issue, shall and may be entitled to the said rents and profits for his and their proper use and benefit respectively, but without any exclusion of, or prejudice to, the estate, interest, or right of any such issue afterwards coming into existence, but only from the time of the birth of such issue respectively.

No. II.

Proviso for shifting the Use upon the Accession of another Estate.¹

PROVIDED always, and it is hereby agreed and declared between and by the said parties hereto, that if the manor of [§452] _____ and hereditaments in the county of _____ mentioned and *comprised in the settlement made in consideration of, and previously to the marriage of A. B., bearing date, &c., and thereby limited and settled upon or to the use of him the said A. B. for life, shall, at any time, by or under the uses and limitations in the same settlement contained, descend or come for an estate tail in possession to, or upon, the elder or any other son of the said C. D. on the body of the said E. F. begotten, born in the lifetime of the said C. D. or in due time after his decease, or to or upon the issue male of such elder or other son, so as to be in the actual possession or receipt of the rents and profits thereof, and there shall be living any other son of the body of the said C. D. on the body of the said E. F. begotten, than the son to or upon whom, or upon whose issue male such estate shall come or descend, or any heirs

¹ [See *Fazakerly v. Ford*, 4 Sim. 390. 1 Adol. & El. 897. *S. C. Morrice v. Langham*, 8 Mee. & Wels. 194.]

male of the body of such other son, then and in that case, and so often as the same shall happen, the use or uses hereinbefore limited to or for the benefit of such son, or his issue male, upon whom such manor and hereditaments, in the county of shall descend or devolve for an estate tail in possession as aforesaid, and his or their issue male, of and in all and singular the hereditaments hereinbefore granted and released, or intended so to be respectively as aforesaid, shall cease, determine, and become void, as if such son or issue male was or were actually dead without issue male of his or their body or bodies; and then and thenceforth the same hereditaments, hereby granted and released, *shall [*453] immediately go and remain to the use of such person and persons, as by virtue of the limitations hereinbefore contained would then be entitled, as the person or persons next in remainder, to the same hereditaments, in case such son or issue male, so becoming entitled to the said manor of and hereditaments in the county of as aforesaid, was or were then dead without issue male of his or their body or bodies; and the same person or persons shall in every such case be entitled to take the same estate and estates in the said hereditaments hereby granted and released, as he or they would have been entitled to take therein by virtue of these presents, if such son, or issue male, so becoming entitled to the said manor and hereditaments in the county of , was or were actually dead without issue male as aforesaid.

No. III. a.

Power to Lease for Twenty-one years in Possession at Rack-rent.

PROVIDED always, and it is hereby agreed and declared between and by the said parties hereto, that it shall and may be lawful for the said A. B. from time to time during his life, and after his decease then for the guardian or

guardians, for the time being, of any child or children of the said A. B. on the body of the said C. D. to be begotten, who by virtue of, or under the limitations hereinbefore *contained, shall be entitled to the possession or receipt of the rents and profits of the hereditaments hereby granted and released, or intended so to be, from time to time, during the minority or respective minorities of such child or children, to demise or lease all or any, or any part or parts of the hereditaments hereby granted and released, or intended so to be, with the appurtenances, to any person or persons for any term or number of years, not exceeding twenty-one years in possession, and not in reversion or by way of future interest, so that there be reserved and made payable in every such lease during the continuance thereof, the best and most improved yearly rent or rents, to go along with, and be incident to, the immediate reversion of the premises so to be leased, that can or may be reasonably had or gotten for the same, without taking any fine, premium, or foregift for the making thereof, and so that in every such lease there be contained a condition of re-entry on non-payment of the rent or rents to be thereon, or thereby, respectively reserved by the space of twenty-one days next after the same shall become due and payable, and so that the lessee or respective lessees, to whom such lease or leases shall be made, seal and deliver a counterpart or counterparts of such lease or leases, and so that no lessee to whom any such lease shall be made, be by any clause or words therein contained authorised to commit waste, or exempted from punishment for committing waste.

[*455]

*No. III. b.

*Power to Lease for Three Lives in Possession or Reversion,
at ancient or accustomed Rents.*

PROVIDED always, and it is hereby agreed and declared between and by the said parties to these presents, that

it shall and may be lawful for the said A. B. during his life, and after his decease for the guardian or guardians, for the time being, of any child or children of the said A. B. on the body of the said C. D. lawfully to be begotten, who by virtue of, or under the limitations hereinbefore contained, shall, for the time being, be entitled to the possession or receipt of the rents and profits of the said manors and other hereditaments hereby granted and released, or intended so to be, during the minority or respective minorities of such child or children, by any deed or deeds, or by copy or copies of court roll, to demise, lease, or grant such part and parts of the said manors and other hereditaments as are now, or have been usually demised or leased, or have been granted by copy of court-roll for one or more life or lives, or for years, determinable on the dropping of one or more life or lives, to any person or persons for one, two, or three lives, or for any term or number of years, determinable on the death or deaths of one, two, or three person or persons, either in possession or in reversion, and to accept or take any fine or premium for the *making or granting of [*456] every such lease or grant; so that there be not more than three lives in being at most upon any part of the said premises so to be granted or leased at any one time; and so that no such grantee, or lessee, his, her, or their heirs, executors, administrators, or assigns, be made disipnisable of waste by any express words therein; and so that upon every such grant or lease the usual and accustomed rents, heriots, and services at the least, or proportional rents, heriots, and services, where a greater or lesser part of any farm or farms, tenement or tenements, shall either separately, or together with any other part or parcel of the same premises or other lands, be demised or granted, or rents, heriots, or services, amounting in the aggregate to the usual rents, heriots, or services, where two or more farms or tenements shall be granted or demised together, be reserved and made payable during the continuance of such grant or lease. And it is hereby agreed and declared, that such rent or rents to be reserved upon every such grant or lease shall be incident to, and shall go along with, the imme-

diate reversion expectant on such grant or lease ; and that in every such grant or lease (other than upon grants or demises by copy of court-roll) there shall be contained a clause of re-entry for non-payment of the rent or rents to be thereby reserved for the space of twenty-one days after any part thereof shall become due, and that the respective lessees of the said freehold hereditaments shall execute counterparts of their *respective leases ; provided always, that if any such grant or lease shall be made by the guardian or guardians of any infant child or children for the time being entitled as aforesaid, then the fine or premium, fines or premiums which shall be received upon every such lease or grant shall be considered as part of the personal estate of the child or children, for the time being, entitled to the possession or receipt of the rents and profits of the hereditaments, which shall be so granted or demised as aforesaid.

No. III. c.

THE following form of a leasing power was prepared by the Author's friend, Peter Bellinger Brodie, Esq., and settled by him and the Author.

It is proper to observe, that when it was intended to authorise the grant of reversionary leases under a power of leasing, the practice seems to have been to enable the donee of the power to grant a lease to commence from, or after, the expiration of the existing lease ; but as the grant of such a lease was, in effect, the grant of an *intestate termini*, it did not carry the immediate reversion expectant on the subsisting lease, nor the rent reserved upon the first lease : it was a lease to commence *in futuro*. A lease granted under such a power was objectionable on this ground : that if the second lease was granted to *commence at a future period, beyond the limits allowed by the policy of the law for perpetuities, it might be considered altogether void. The following power was framed to obviate this inconveni-

ence, in a case where the property, the object of the power, was subject to subsisting leases.

" Provided always, and it is hereby agreed and declared between and by the parties to these presents, that it shall be lawful for the said A. B. and C. D., and the survivor of them, and the executors or administrators of such survivor, from time to time and at all times hereafter, with the consent of the within-mentioned William Marmont the elder, during his life, and after his decease with the consent of the person, who for the time being shall, under and by virtue of the limitations contained in the said recited indenture of appointment, release, and settlement, be tenant for life, or in tail male in possession, or actually entitled to the receipt of the rents, issues, and profits of the manors, hereditaments, and premises, thereby limited, and for the time being remaining in strict settlement, if such person shall be of the age of twenty-one years or upwards; but if such person shall be under that age, then, during the minority of such person, with the consent of his guardian or guardians (every such consent to be testified by some writing under the hand or hands of the person or persons whose consent shall, for the time being, be requisite), by any deed or deeds, *instrument or instruments, in writing, [*459] either referring to, or not referring to, this present power, to be sealed and delivered by the said A. B. and C. D., or the survivor of them, or the executors or administrators of such survivor, in the presence of, and attested by, two or more credible witnesses, to demise or lease the messuages and hereditaments comprised in the leases particularised in the first schedule written under, or annexed to, these presents, or any of them, or any part or parts thereof, to any person or persons whomsoever, for any term not exceeding ninety-nine years, to take effect in possession, and not in reversion or by way of future interest, and at such yearly rent or rents to be reserved on every such demise or lease, and to be made payable during the term thereby to be created, as the said A. B. and C. D., or the survivor of them, or the executors or administrators of such survivor, shall in their or his full discretion, and without being answerable

or accountable for the exercise of such discretion, think fit; and so that there be contained in every such demise or lease, a clause in the nature of a condition for re-entry on the non-payment of the rent or rents (not being a peppercorn rent) thereby to be reserved, in case the same, or any part thereof, shall be in arrear for the space of twenty-one days next after the same shall become due and payable; and so that the lessee or lessees be not, by any clause or words to be contained therein, made dispunishable for waste, or exempted from punishment for *committing waste; and for the granting [^{*460}] every such demise or lease, the said A. B. and C. D., and the survivor of them, and the executors or administrators of such survivor, shall accept as a fine or premium such a sum of money as they or he shall, in their or his full discretion, and without being answerable or accountable for the exercise of such discretion, think fit.

"And it is hereby further agreed and declared, that concurrent leases may be granted under the power hereinbefore contained; and that every lease to be granted under the said power, shall be valid and effectual, notwithstanding at the time of granting such lease the hereditaments therein comprised shall be subject to one or more existing lease or leases thereof.

"And it is also further provided, agreed, and declared, that the sums to be raised by the said A. B. and C. D., or the survivor of them, or the executors or administrators of such survivor, by fines or premiums, on the granting of the lease or leases under the power aforesaid, shall not exceed in the whole the sum of £ .

"And it is also hereby further agreed and declared, that the receipts in writing of the said A. B. and C. D., or the survivor of them, or the executors or administrators of such survivor, for any sum or sums of money which shall be accepted by him or them as fines or premiums for *the granting of any lease or leases [^{*461}] under the power hereinbefore contained, shall effectually discharge the person or persons paying the same; and that no such lease to be granted under such power as aforesaid shall be invalidated, notwithstanding

more than the sums hereby authorised to be raised shall have been so raised."

No. III. d.

Power to Grant Repairing or Building Leases.

PROVIDED always, and it is hereby agreed and declared between and by the said parties hereto, that it shall and may be lawful to and for the said John Jones, during his life, and after his decease, to and for the person who, by virtue of, or under the limitations hereinbefore contained, shall, for the time being, be entitled to the first estate of freehold or inheritance of and in the said manors and other hereditaments expressed to be hereby granted and released, in case such person shall be of full age; but if not, then for the guardian or guardians for the time being, of such person during his minority, to demise or lease all or any, or any part of the said hereditaments situate and being in or near

in the county of and of the wastes or commons within the manors of or either of them, unto any person or persons who shall be willing to take the same, for the purpose of effectually repairing any building or *buildings which shall be standing, [*462] or being on the hereditaments so to be demised or leased, or for the purpose of rebuilding or of erecting a new building or new buildings upon the hereditaments which shall be so demised or leased, or any part thereof, with liberty to take or pull down any erection or building, erections or buildings then standing or being upon the hereditaments so to be demised or leased, for the purpose of rebuilding or new building as aforesaid, or any part thereof, and to make use of the materials for the purpose of such rebuilding or new building; and also to lay out and appropriate any part or parts of the ground, which shall be thereby demised or leased, as for a yard or garden, or for any other convenience, to be held, occupied, or enjoyed, with any such building or buildings;

so that every such demise or lease, for the purpose of new building or rebuilding, be made for any term or number of years, not exceeding the term of sixty-one years; and so that every such demise or lease, for the purpose of effectually repairing any messuage or tenement, building or buildings, be made for any term or number of years not exceeding the term of thirty-one years; and so from time to time, and in like manner, to demise or grant a new lease or new leases, for rebuilding, new building, or repairing the same hereditaments or any part thereof, for such term or terms respectively as aforesaid; and so that every such demise or lease shall take effect in possession and not in reversion, or by way of [*463] *future interest, and so that upon every such demise or lease to be made in pursuance of this power, there be reserved to be paid and payable half yearly or oftener, during the continuance thereof, and to be incident to, and to go along with, the immediate remainder or reversion expectant on the determination thereof, the best and most beneficial rent or rents, that at the time of granting thereof (considering the nature and circumstances of the case) can be reasonably had or obtained for the same hereditaments so to be demised or leased, and so that in every such lease or demise, a condition of re-entry be reserved in case of non-payment of the rent or rents thereby to be reserved by the space of twenty-one days next after any part of such rent or rents shall become due, and so that the lessee or lessees to be named in each such lease, seal and deliver a counterpart thereof.

No. III. e.

Power to Grant Building Leases on Waste or Uncultivated Lands.

PROVIDED always, and it is hereby agreed and declared between and by the said parties hereto, that it shall and may be lawful to and for the said A. B. during his life,

and after his decease to and for the person who by virtue of or under the limitations hereinbefore contained, shall, for the time being, be entitled to the actual possession or *receipt of the rents and profits of the said [*464] manors and other hereditaments expressed to be hereby granted and released, in case such person shall be of full age, but if not, then for the guardian or guardians for the time being of such person during his minority, to grant, demise, or lease, as well all or any part or parts of the said hereditaments hereinbefore expressed to be hereby granted and released, which consist of uncultivated or waste lands, as also all or any part or parts of the said hereditaments which have been at any time or times since the date and execution of the said recited indenture of the day of

or which shall or may at any time or times hereafter be allotted in respect of the said manor and other hereditaments hereby granted and released, or any of them or any part thereof, from or out of any common or commons, or waste lands whatsoever that have been, or shall or may at any time or times hereafter, be divided and enclosed, unto any person or persons, for one, two, or three life or lives, or for any term or number of years, determinable on the death or deaths of one, two, or three person or persons, either in possession or reversion, so that there be no more than three lives in being at most upon any part of the said lands so to be demised or leased, at any one time, together with full and free liberty, license, power, and authority, to dig for, and work up, any stone which may be found in or under the lands so to be demised or leased, for the purpose of erecting and building such *houses, cottages, and [*465] other buildings as hereinafter are mentioned; and also to dig clay, gravel, sand, peat, or other soil, which may be necessary for the making of brick or tiles, to be used in or about the building and erecting such houses, cottages, and other buildings, or in or about the manuring and improving the lands so to be demised or leased as last-mentioned; and also to erect, build, and set up in any convenient place or places upon the lands so to be demised or leased as last-mentioned, all such hovels,

sheds, or other buildings as shall from time to time be necessary for the burning or making such bricks or tiles as aforesaid, or for the placing of any workmen, horses, carriages, utensils, or materials to be employed or used in or about the digging of such stone, gravel, sand, or other soil, or the making or burning of such bricks or tiles as aforesaid, or in or about the cultivating, planting, improving, and enclosing the same lands respectively; and also full and free liberty, license, power, and authority to erect, build, and set up, in any convenient place or places in or upon the said lands so to be demised or leased as last-mentioned, any houses, cottages, or other buildings, which it may be deemed necessary or expedient to erect or build thereon, for the better carrying on the cultivation and improvement of such lands respectively, and for the habitation and accommodation of the respective lessees thereof, or their under-tenants, workmen, servants, or agents ; so that in every such last-mentioned lease, all mines, minerals, and quarries, in or [*466] under the lands to be thereby respectively demised (except as before-mentioned,) and full powers for working, raising, and carrying away the same, be expressly excepted and reserved ; and so that upon every such last-mentioned lease, there be reserved and made payable during the continuance thereof, the best yearly rent or rents, reservation or reservations, which, under the circumstances of the case, can be reasonably had or gotten for the same, without taking any fine, premium, or fore-gift in respect thereof ; and so that in every such last-mentioned lease, there be contained a condition or power of re-entry for non-payment of the rent or rents, reservation or reservations, to be thereby reserved ; and so as the lessee or respective lessees, to whom every or any such lease shall be made, duly execute a counterpart thereof, and thereby enter into such covenants and agreements for the tilling, manuring, cultivating, planting, improving, and enclosing the lands to be comprised in such lease, and for the building, repairing, and keeping in repair, the houses, cottages, and buildings thereon, or to be erected thereon as aforesaid, and for preserving the boundaries and limits of the same lands respectively,

and for the training up and preserving the trees and saplings already growing or hereafter to be set or planted thereon, as shall be deemed necessary or proper; and also (if it shall be thought necessary or proper) to enter into any covenant or covenants, for the renewal or *renewals of any such last-mentioned lease, either [*467] perpetually or for a limited time, by the person for the time being seised of, or entitled to, the said manors and other hereditaments comprised in such lease, by adding a new life or lives, in the place or stead of any *cestui que vie*, or *cestuis que vie*, who shall die, at or under the yearly rent or rents reserved upon the preceding lease, and upon payment on each renewal of two years' improved value of the premises, of which the lease shall be so renewed, as or by way of fine, or upon the reservation of such an additional rent as shall be equivalent to such improved value, and in lieu thereof, so that there be not more than three lives in being at most upon any part of the said lands so to be leased and demised, at any one time, and to grant any lease or leases in pursuance of such covenant or covenants for renewal ; and which said covenant or covenants for renewal shall be binding and conclusive upon the person or persons, who for the time shall (subject to such lease or leases) be seised of or entitled to the said lands and hereditaments, the lease or leases of which shall be so required to be renewed.

No. III. f.

Power to Grant Mining Leases.

PROVIDED always, and it is hereby further agreed and declared between and by the said parties to these presents, that it shall and may *be lawful to and for the said A. B. during his life, and after his de- [*468] cease, to and for the person, who, by virtue of or under the limitations hereinbefore contained, shall, for the time being, be entitled to the actual possession or receipt of

the rents and profits of the said manors and other hereditaments in the said counties of
expressed to be hereby granted and released, in case such person shall be of full age, but if not, then to and for the guardian or guardians for the time being, of such person during his minority, to grant, demise, and lease, all and every or any of the mines, veins, and seams of iron, ironstone, and coal, and other mines or minerals, and quarries, found or discovered, or which shall or may at any time or times hereafter be opened, found, or discovered in, under, or upon any of the same manors or other hereditaments in the said counties of

or either of them ; and also any part or parts of the same lands and hereditaments, which it shall or may be thought expedient to demise and lease with such mines and quarries, for the better and more effectually working the same, unto any person or persons for any term or number of years not exceeding years, to take effect in possession, and not in reversion, or by way of future interest, together with full and free liberty, license, power, and authority, to search for, take, use, and dispose of all such iron, ironstone, coals, and other metals and minerals whatsoever as shall be found [*469] in the same mines, *veins, seams, and quarries, and to sink, win, work, and make groves, shafts, drifts, trenches, sluices, waygates, watergates, and watercourses, and to erect any furnace or furnaces, fire or other engines, mills, or gins, and to use all other lawful ways and means whatsoever, as well for the finding, discovering, winning, working, and getting of iron, ironstone, coals, and other metals or minerals, forth and out of the said mines and quarries, as for avoiding and carrying away water, foul air, or stench from, forth, and out of the same ; and also full and free liberty, license, power, and authority, to take and use sufficient ground-room, heap-room, and pit-room, for laying, placing, and manufacturing the iron, ironstone, coals, earth, and rubbish, that shall from time to time proceed from, or be wrought, dug, or gotten out of, the said mines and quarries ; and also full and sufficient ways, paths, and passages, to and for the respective lessees to be named in

such demises or leases, and their agents, workmen, and servants, from time to time, during the continuance of such leases respectively, to take and carry away with horses, carts, wains, wagons, and other carriages, all the iron, ironstone, coals, metals, and minerals, which shall, from time to time, be wrought, won, or gotten, in, forth, from, and out of, the said mines and quarries thereby to be demised or leased; and also full and free liberty, license, power, and authority to erect, build, and set up, in any convenient place or places, near any of the said mines or quarries so *to be demised or leased, all [*470] such houses, hovels, lodges, sheds, or other buildings, as shall from time to time be needful, or convenient for the standing, laying, and placing any workmen, horses, gear, utensils, or materials, to be employed or used in or about the working of the said mines and quarries respectively; and to dig, and get up, stone, peat, or clay, for erecting, building, and repairing such houses and other buildings, and to do whatsoever else shall be deemed needful or requisite in or about, or for, the winning, working, obtaining, getting, washing, cleansing, and smelting of iron, ironstone, coals, metals, and minerals; from, forth, and out of the said mines and quarries, and for the manufacturing, taking, and carrying away the same, so that upon every such lease there be reserved and made payable, during the continuance thereof, the best and most improved yearly rent or rents, tolls, duties, and reservations that can, under the circumstances of the case, be reasonably had or gotten for the same, without taking any fine, premium, or foregift, for the making thereof, and so that in every such lease there be contained a condition or power of re-entry for the non-payment of the rent or rents, tolls, duties, or reservations, to be thereby respectively reserved, at such time or times after the same shall become due, as shall be thought proper or deemed advisable; and so that the respective lessees to be named in such leases duly execute counterparts thereof respectively, and enter into such covenants and agreements *for the due and [*471] punctual rendering and paying the rent or rents, tolls, duties, and reservations to be thereby respectively

reserved, and for the working and managing of the said mines and works, and for the building, repairing, and keeping in repair, the houses, cottages, and other buildings to be mentioned in such leases respectively, as shall be deemed necessary, or as shall be thought proper and reasonable.

No. IV. a.

Power enabling a Tenant for Life in Possession to Limit a Rent-charge by way of Jointure.

PROVIDED always, and it is hereby agreed and declared between and by the said parties hereto, that it shall and may be lawful for the said A. B. by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of, and attested by, two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, but subject, and without prejudice, to the said yearly rent-chage of £ and the powers and remedies hereinbefore limited for the payment thereof, and to the aforesaid term of ninety-nine years under the trusts aforesaid, for better securing the same yearly rent-chage, to limit or appoint to, or to the use of, or in trust for, [*472] any woman or women, *whom he shall or may marry, for her or their life or respective lives, and for, or by way of, her or their jointure or respective jointures, and in bar, or without being in bar, of her or their dower or respective dowers, and either before or after marriage, any annual sum or annual sums of money, or yearly rent-chage or yearly rents-chage, not exceeding for one woman the yearly sum of £ of lawful money of Great Britain, to be issuing and payable out of, and charged and chargeable upon, all or any part of the manor and other hereditaments expressed to be hereby appointed and released, free from taxes, and without any other deduction whatsoever, and to be paid in such man-

ner as to the said A. B. shall seem meet; and also to limit and appoint to or for the woman or women respectively, to or for whom the annual sum or annual sums, or yearly rent-charge or yearly rents-charge, shall be so appointed as aforesaid, usual powers and remedies for recovering and enforcing payment thereof respectively by distress and entry upon, and perception of the rents and profits of, the hereditaments which shall be so charged with the said annual sum or annual sums, yearly rent-charge or yearly rents-charge; and also to limit and appoint the hereditaments, which shall be so charged, to any person or persons, for any term or terms of years, with or without impeachment of waste, upon such trusts for better securing the due payment of such annual sum or annual sums, or yearly rent-charge or yearly rents-charge, as to *the said A. B. shall seem meet; but [*473] so, that upon the death of the woman or respective women, for the benefit of whom such term or respective terms shall be so created, and the payment of the rent-charge or respective rents-charge, and the expenses incurred by the non-payment thereof respectively, the term or respective terms, which shall be created for securing such yearly rent-charge or respective rents-charge, or so much of the same term or respective terms, as shall not be disposed of under the trusts to be declared for securing the same yearly rent-charge or respective rents-charge, shall be made to cease and determine.

No. IV. b.

Proviso enabling Tenants for Life in Remainder to Limit Rents-charge, by way of Jointure.

PROVIDED always, and it is hereby agreed and declared between and by the said parties to these presents, that it shall and may be lawful for each of them the said C. D., E. F., and G. H., either before, or when, by virtue of the limitations hereinbefore contained, he shall be in the possession, or entitled to the receipt of the rents and

profits of the hereditaments expressed to be hereby appointed and released, by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of, and attested by, two or more [^{*474}] credible *witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, (but subject, and without prejudice, to the uses and estates preceding the use or estate of the person making such appointment, and to the powers relating to such preceding uses or estates, if any such uses, estates, or powers shall be then subsisting, or capable of taking effect, or being exercised; and also subject, and without prejudice, to the uses or estates, if any, which shall or may be limited in exercise of the same powers or any of them), to limit or appoint unto, or to the use of, or in trust for, any woman or women, with whom he may intermarry, for the life or respective lives of such woman or women respectively, and for her or their jointure or respective jointures, and in bar, or without being in bar, of her or their dower or respective dowers, and either before or after marriage, any annual sum or yearly rent-charge, or annual sums or yearly rents-charge, not exceeding in the whole for one woman the sum of £ of lawful money of Great Britain, to be yearly issuing out of, and charged and chargeable upon, all or any part of the said hereditaments expressed to be hereby appointed and released, free from taxes, and without any other deduction whatsoever, and to be paid in such manner as to him shall seem meet; and also to limit or appoint to or for the woman or respective women to or for whom such annual sum or yearly rent-charge, annual sums or yearly rents-charge, shall be so appointed, usual powers and [^{*475}] *remedies for recovering and compelling payment thereof by distress and entry, and perception of rents and profits; and also to limit and appoint the same hereditaments unto any person or persons for any term or terms of years, either with or without impeachment of waste, upon such trusts, for better securing the due payment of such annual sum or annual sums, or yearly rent-charge or yearly rents-charge, as to the person, for

the time being making such appointment, shall seem meet; but so that, upon the death of the woman or respective women for the benefit of whom such term or respective terms shall be so created, and the payment of the rent-charge or respective rents-charge, and the expenses incurred by the non-payment thereof respectively, the term or respective terms, which shall be created for securing such yearly rent-charge or respective rents-charge, or so much of the said term or respective terms, as shall not be disposed of under the trusts to be declared for securing the same yearly rent-charge or respective rents charge, shall be made to cease and determine: but it is hereby agreed and declared between and by the said parties to these presents, that if they the said B. D., E. F., and G. H., or any of them, at any time or times hereafter, before they respectively shall, by virtue of, or under, the limitations hereinbefore contained, be in the actual possession, or receipt of the rents and profits, of the hereditaments expressed to be hereby appointed and released, shall, in exercise *of the powers hereinbefore reserved to them respectively, [*476] limit and appoint to, or in trust for, any woman or women whom he or they shall or may marry, any annual sum or annual sums, or yearly rent-charge or yearly rents-charge, by way of jointure as aforesaid, then and in every such case, no annual sum or annual sums, yearly rent-charge or yearly rents-charge, which shall be so limited or appointed as aforesaid, shall take effect in possession, or charge the hereditaments expressed or intended to be charged with the same respectively, or be payable, unless and until the person limiting or appointing the same as aforesaid, shall under, or by virtue of, the limitations aforesaid, or some of them, become entitled to the possession or receipt of the rents and profits of the same hereditaments, or if he shall die previously thereto, then unless and until he would, in consequence of the determination of the uses or estates preceding the use or estate hereby limited to him, have become, if living, entitled to the possession or receipt of the rents and profits of the same hereditaments, at any time during the life of his wife, to or for whom such annual

sum or yearly rent-charge shall be so limited as aforesaid.

Provided also, and it is hereby agreed and declared between and by the said parties to these presents, that the said hereditaments shall not under or by virtue of these presents, or the powers hereinbefore contained, or [*477] any of them, (and including *the said yearly rent-charge of £ , provided for the said I. K. as aforesaid,) be at any one time subject or liable to the payment of any annual sum or annual sums, or yearly rent-charge or yearly rents-charge by way of jointure, exceeding in the whole the annual sum of £ ; so that if, by virtue or in exercise of the aforesaid powers of jointuring, or any of them, the said hereditaments, or any part or parts thereof, would, in case this present proviso had not been inserted, be charged with a greater annual sum for jointures in the whole than the said sum of £ , the payment of the sum occasioning such excess, or such part thereof as shall occasion the same, shall, during the time of such excess, be suspended.

No. V. a.

Proviso enabling a Tenant for Life, in Possession, to charge for Younger Children's Portions.

PROVIDED always, and it is hereby agreed and declared between and by the said parties hereto, that it shall and may be lawful to and for the said A. B., at any time or times during his life, by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of, and to be attested by, two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, [*478] (but subject, and without prejudice, to *the said yearly rent-charge of £ and the powers and remedies hereinbefore limited for enforcing payment

thereof, and to the said term of ninety-nine years, under the trusts aforesaid, for better securing the same yearly rent-charge, and also subject, and without prejudice, to any other jointure, which may limited or created by the said A. B., in exercise of the power hereinbefore reserved to him for that purpose,) to subject and charge all or any part of the said hereditaments expressed to be hereby released, to and with the payment of any sum or sums of money, not exceeding in the whole the sum of £ of lawful money of Great Britain, for the portion or portions of all, and every, or any of the children of the said A. B., lawfully begotten or to be begotten (other than, or not being any of them an eldest or only son, for the time being, entitled to the said hereditaments expressed to be hereby released for an estate tail in possession, or in remainder expectant upon the decease of the said A. B.,) with interest for the same at any rate, not exceeding 5l. for every 100l. by the year, to be paid to, or shared and divided between or amongst all, and every, or any one or more of the children of the said A. B. (other than, or not being any of them, an eldest or only son for the time being entitled as aforesaid,) at such age or respective ages, days, or times, and in such parts, shares, and proportions, and with such conditions, restrictions, and limitations over for the benefit of some or one of the same children (other than, or not being any of them *an eldest or only son for the time [*479] being entitled as aforesaid,) and in such manner as he the said A. B., by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of, and attested by, two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, shall direct or appoint ; and that for the purpose of raising such portion or portions, with interest for the same, it shall and may be lawful for the said A. B. by the same or any other deed or deeds, instrument or instruments in writing, so sealed and delivered and attested as aforesaid, or by such his last will and testament in writing, or any codicil or codicils thereto, (but subject, and without prejudice,

as hereinbefore is mentioned,) to limit or appoint all or any part of the hereditaments, which shall be so charged as hereinbefore is mentioned, with the appurtenances, to any person or persons, for any term or terms of years, with or without impeachment of waste, in trust, by way of mortgage, to raise the money so to be charged; but so that it be declared by the deed, will, or instrument, creating such term or terms of years, that when the trusts, which shall be declared concerning the same term or terms, shall have been fully performed or satisfied, or shall have become unnecessary or incapable of being performed, and the costs, charges, and expenses, if any, of the trustee or trustees of the same term or terms in [*480] and about the execution *and performance of the trusts thereof, shall be paid or satisfied, the same term or terms, or so much thereof, as shall not be disposed of under the trusts thereof, shall cease and determine.

No. V. b.

Proviso enabling Tenants for Life in Remainder to charge for Younger Children's Portions.

PROVIDED always, and it is hereby further agreed and declared between and by the said parties to these presents, that it shall and may be lawful to and for each of them, the said C. D., E. F., and G. H., either before or when and as, by virtue of or under the limitations hereinbefore contained, he shall be in the actual possession or receipt of the rents and profits of the said hereditaments, expressed to be hereby released, by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of, and attested by, two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, (but subject, and without prejudice, to the uses and estates preceding the use or estate hereby limited to him, and

to the powers relating to such preceding uses or estates, if any such uses, estates, or powers shall be then subsisting or capable of taking effect and being exercised; and also subject and without prejudice *to the uses or estates to be limited in execution of the same [*481] powers or any of them, and subject and without prejudice to any jointure limited or created, or which shall be limited or created by him in exercise of the power for that purpose hereinbefore reserved to him,) to subject and charge all or any part of the said hereditaments expressed to be hereby released, to and with the payment of any sum or sums of money for the portion or portions of the child or children of the person making such appointment, other than, or not being any of them an eldest or only son for the time being entitled to the said hereditaments for an estate in tail male in possession, or in remainder expectant on the decease of his parent, not exceeding in the whole the sum or sums of money herein-after mentioned, (that is to say:) If but one such child, other than, or not being an eldest or only son, for the time being, entitled as aforesaid, not exceeding the sum of £ for his or her portion; if two or three such children, and no more, other than, or not being any of them an eldest or only son, for the time being, entitled as aforesaid, not exceeding the sum of £ for their portions; and if more than three such children, other than, or not being any of them an eldest or only son, for the time being, entitled as aforesaid, not exceeding the sum of £ for their portions; and with interest for the same sums of money respectively, at any rate not exceeding 5l. for every 100l. by the year; and such sum or sums of money to be paid to *such child, or if more than [*482] one such child, then to be paid to, shared and divided between or among, the children respectively for whom the same shall be intended to be provided, at such age or respective ages, days, or times, and if more than one, in such parts, shares, and proportions, and with such conditions, restrictions, and limitations over for the benefit of some or one of the same children, as the person making such limitation or appointment shall by any deed or deeds, instrument or instruments in writing, with

or without power of revocation and new appointment, to be by him sealed and delivered in the presence of, and to be attested by, two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, direct or appoint; but so nevertheless, that if there shall be only one such child of the person making such appointment, who shall live to attain a vested interest in the sum or sums of money so to be charged as aforesaid, such child shall not in any case, by survivorship or otherwise, have or be entitled to more than the sum of £ for his or her portion; and if there shall be two or three such children, and no more, who shall live to attain vested interests in the respective portions so to be charged as aforesaid, such two or three children shall not in any case, by survivorship or otherwise, have, or be entitled to more than the sum of £ for their portions: and that for the purpose of raising such portion or portions and interest for the same respectively, *it shall and may be lawful to and [**483] for the person making such appointment as lastly hereinbefore is mentioned, by the same, or any other deed or deeds, instrument or instruments in writing, so sealed, delivered and attested as aforesaid, or by such his last will and testament in writing, or any codicil or codicils thereto, but subject and without prejudice as aforesaid, to limit or appoint all or any part of the hereditaments which shall be so charged as lastly hereinbefore is mentioned, to any person or persons for any term or terms of years, with or without impeachment of waste, upon trust, by way of mortgage, to raise the money so to be charged; but so that it be declared by the deed, will, or instrument creating such term or terms of years, that when the trusts which shall be declared concerning the same term or terms shall have been fully performed or satisfied, or shall have become unnecessary or incapable of being performed, and the costs, charges, and expenses, if any, of the trustee or trustees of the same term or terms in and about the execution and performance of the trusts thereof shall be paid or satisfied, the same term or terms, or so much thereof as shall not be disposed of under the trust thereof, shall cease and determine: but

it is hereby agreed and declared between and by the said parties hereto, that if the said C. D., E. F., and G. H., or any of them, at any time or times hereafter, before they shall respectively by virtue of, or under, the limitations hereinbefore contained, be in the actual possession or receipt *of the rents and profits of the hereditaments expressed to be hereby released, shall, [*484] in exercise of the powers hereinbefore enabling them respectively in that behalf, subject and charge the said hereditaments or any of them, or any part thereof, with the payment of any sum or sums of money for a portion or portions as aforesaid; then, and in every such case, the sum or sums of money so expressed or intended to be charged for a portion or portions, shall not be a lien or a charge upon the hereditaments so expressed, or intended to be charged with the same respectively, or become vested in, or payable to any person or persons whomsoever, nor carry interest, unless and until the person or persons so charging the same hereditaments with a portion or portions as aforesaid, or some one, or more of his or their issue male, shall under, or by virtue of, the limitations hereinbefore contained, or any of them, become entitled to the actual possession or receipt of the rents and profits of the same hereditaments, any thing hereinbefore contained to the contrary notwithstanding: provided always, nevertheless, and it is hereby agreed and declared between and by the said parties to these presents, that the said hereditaments shall not under, or by virtue of, the powers hereinbefore contained, or any of them, be at any one time subject or liable to the payment of any sum or sums of money exceeding the principal sum of £ in the whole, for the portions of daughters or younger sons as aforesaid.

*No. VI.

[*485]

PROVIDED always, and it is hereby declared and agreed, by and between the said parties to these presents, that it shall and may be lawful to and for the said B. B. and C. C. and the survivor of them, and the heirs of such

survivor; and they and he are hereby authorised and empowered, at any time or times hereafter, at the request and by the direction of the said E. E. and I. T. during their joint lives, and after the decease of either of them, then at the request and by the direction of him or her surviving, during his or her life (such request and direction to be testified by some writing or writings sealed and delivered by the said E. E. and I. T. or the survivor of them, and to be attested by two or more credible witnesses), to make sale, alien, and dispose of, or to convey in exchange for, or in lieu of, other messuages, lands, or hereditaments, to be situate somewhere in England or Wales, all or any part of the hereditaments hereby granted and released, or intended so to be, with the appurtenances, and the inheritance thereof in fee-simple, to any person or persons whomsoever, either together or in parcels, for such price or prices in money, or for such equivalent or recompence in messuages, lands, or hereditaments, as to them the said B. B. and C. C., or the survivor of them, or his heirs, shall seem reasonable; and [^{*486}] that for the intents and purposes *aforesaid, or any of them, it shall and may be lawful to and for the said B. B. and C. C., and the survivor of them, and the heirs of such survivor, at such request, and with such direction, and so testified as aforesaid, by any deed or deeds, writing or writings, to be by them the said B. B. and C. C., or the survivor of them, or his heirs, sealed and delivered in the presence of, and attested by, two or more credible witnesses, to revoke, determine, and make void all and every the uses, estates, trusts, limitations, powers, provisoies, and agreements, hereinbefore limited, expressed, declared, and contained, of and concerning the hereditaments so to be sold or exchanged, or any part thereof; and by the same, or any other deed or deeds, writing or writings, to be by him or them sealed and delivered, and attested as aforesaid, to limit and appoint, direct and declare, such use or uses, estate or estates, trust or trusts, of the hereditaments, the uses whereof shall be so revoked, which it shall be thought necessary or expedient to limit, declare, or appoint, in order to effect such sale, exchange, or disposition as

aforesaid; and that upon any such exchange as aforesaid, it shall and may be lawful for the said B. B. and C. C., or the survivor of them, or his heirs, to receive or take any sum or sums of money by way of equality of exchange; and also upon payment of any money to arise by such sale of the said hereditaments, or any part thereof, or any money to be received or taken for, or by way of, equality of exchange, it shall and may be [*487] *lawful to and for the said B. B. and C. C., or the survivor of them, or his heirs, to give and sign receipts for the money, for which the same shall be so sold, or so to be paid for equality of exchange; which receipts shall be sufficient discharges to the person or persons paying the same respectively, for the money for which the same shall be so given, or for so much thereof as in such receipts shall be respectively acknowledged or expressed to be received; and that the person or persons paying the same respectively, and taking such receipt or receipts for the same as aforesaid, shall not afterwards be obliged to see to the application, or be in any wise answerable or accountable for any loss, misapplication, or nonapplication of such money, or any part thereof.² Provided nevertheless, and it is hereby also declared and agreed, by and between the said parties hereto, that when all or any part or parcel of the said hereditaments, hereby made saleable as aforesaid, shall be sold in pursuance of these presents for a valuable consideration in money, and *also when any sum or sums of money [*488] shall be received for equality of exchange in pursuance of the power hereinbefore contained, then they the said B. B. and C. C., or the survivor of them, or his heirs, shall with all convenient speed (with the consent of the said E. E. and I. T. during their joint lives, or of the survivor of them during his or her life, to be testified

² It is usual to introduce a clause in this place declaring, that upon sale or exchange, the estates so sold, or exchanged, shall be discharged of the uses of the settlement; and that the releasees shall thenceforth stand seized to the use of the purchaser. But this clause seems to be altogether useless: for the appointment under the power must necessarily discharge the estates of the former uses. Besides, as the uses under the appointment may be limited, so as to provide for a variety of circumstances, there is an impropriety in declaring, that the releasees in the original settlement shall stand seized to the use of the purchaser, or the person to whom the estate shall be conveyed, and his heirs.

by writing under their, his, or her hands or hand, and after the decease of such survivor, then with the consent in writing of the person or persons who would, under or by virtue of the limitations hereinbefore contained or to be contained or referred to in the settlement or conveyance hereinafter directed, or any of them, be for the time being in the actual possession, or entitled to the receipt of the rents and profits of the hereditaments to be purchased as hereinafter is mentioned or directed, in case the same were then actually purchased, if such person or persons be of full age, but if not, then with the consent in writing of the guardian or guardians, for the time being, of such person or persons respectively) lay out³ and invest all and every the sum and sums [*489] *of money, which shall arise by such sale or sales, and be paid for equality of exchange as aforesaid, in the purchase of other messuages, lands, or hereditaments in possession, to be situate, being, or arising somewhere in England or Wales, of a clear and indefeasible estate of inheritance in fee-simple (whereof any part, not exceeding one-fourth part in any one purchase, may,

* Sometimes the following form is adopted in lieu of that here stated—"lay out and invest the moneys to arise by such sale or sales, and to be received for equality of exchange, in the purchase of a clear and indefeasible estate of inheritance in fee-simple, or of lands of a leasehold or copyhold tenure convenient to be held therewith, or with any of the hereditaments hereinbefore expressed to be hereby granted and released (such leasehold hereditaments being held for an unexpired term of not less than sixty years); and moreover that the said B. B. and C. C., or the survivor of them, or the heirs, executors, or administrators of such survivors, do and shall settle and assure, or cause to be settled and assured, as well the messuages, lands, tenements, and hereditaments so to be purchased, as the messuages, lands, tenements, and hereditaments, so to be received in exchange as hereinbefore is mentioned, to such and the same uses, upon and for such and the same trusts, intents, and purposes, and with, under, and subject to, such and the same powers, provisoos, declarations, and agreements, as are in and by these presents limited, expressed, declared, and contained of and concerning the premises, which shall be so sold or exchanged, or as near thereto as the nature or quality of the lands so to be purchased, and the deaths of parties, and other circumstances, will permit; yet so that if any of the said hereditaments so to be purchased shall be held by lease or leases for years, the same leasehold hereditaments shall not vest absolutely in any son of the said E. E. on the body of the said F. F. to be begotten, who shall take an estate in tail by purchase of and in the said freehold hereditaments, unless such son shall attain the age of twenty-one years, or shall die under that age, leaving issue of his body living at his decease, or born in due time after; but nevertheless the son so for the time being entitled as aforesaid shall, after the death of the said E. E., and during such suspense of absolute vesting as aforesaid, be entitled to the rents, issues, and profits of the same leasehold hereditaments for his own use and benefit, subject as aforesaid."

if the parties interested shall think fit, be copyhold of inheritance); and as well the hereditaments so to be purchased, as all and every the hereditaments so to be received in exchange as aforesaid, shall *thereafter forthwith be settled, conveyed, and assured [*490] to, for, and upon, such uses, trusts, intents, and purposes, and with, under and subject to such powers, provisoies, conditions, and agreements, as are in and by these presents limited, expressed, declared, and contained, of and concerning the hereditaments in lieu of which, the hereditaments so to be purchased, or received in exchange, shall be substituted, or as near thereto as the deaths of parties, and other contingencies, or the circumstances of the case, will then permit. Provided always, and it is hereby further declared and agreed by and between the said parties to these presents, that in the mean time and until the money to arise by such sale or sales, or to be received for equality of exchange as aforesaid, shall be laid out and invested in a purchase or purchases in the manner hereinbefore mentioned, it shall and may be lawful to and for the said B. B. and C. C., and the survivor of them, and the heirs of such survivor, by and with the consent and approbation of the said E. E. and I. T., or of the survivor of them, to be testified as last mentioned, and from and after the decease of such survivor, then by and of the proper authority of the said trustees or trustee for the time being, from time to time to place out and invest such sum or sums of money in the public stocks or funds of Great Britain, or at interest upon government or real securities in England or Wales; and from time to time, with such consent and approbation, and so testified as aforesaid, or *of their or [*491] his own proper authority, as the case shall happen, to alter, vary, sell, transfer, and dispose of such stocks, funds, or securities, and lay out and invest the money arising by such alteration, sale, transfer, or disposition again, upon new or other stocks or funds, or at interest upon government or real securities of the like nature, as often as they shall think proper; and the interest, dividends, and annual proceeds arising from such stocks, funds, or securities, shall from time to time go

and be paid to such person or persons, and be applied to such uses, intents and purposes, and in such manner as the rents and profits of the hereditaments, to be purchased therewith, would go and be payable or applicable, in case such purchase or purchases were actually made.

No. VII.

See pages 187 to 199, where the case, upon which the following opinion was given, is stated.

We have considered this case with the opinions which have been given thereon.

We think, that the power of sale and exchange was not destroyed by the recoveries suffered in 1811.

It is unnecessary to consider the distinction which has been taken between powers collateral *or in gross, [*492] and powers simply collateral; as the ground upon which Mr. ____ thinks, that the recovery destroys the power, viz. "that the power is a contingent use, which is collateral to the estate tail, and if exercised would over-reach it," would equally apply to powers of both descriptions. We know of no authority for this position. The rule, as established by the cases, we conceive to be, that a recovery by tenant in tail destroys conditional limitations, which would determine the estate tail before a failure of issue, as well as remainders expectant upon the natural determination of the estate. But we think, that the power of sale and exchange is not in the nature of a conditional limitation, or a contingent use defeating or determining an estate tail. The execution of the power, is the limitation of a use under, and by the effect of, the instrument, by which the power was reserved, and within the compass of an estate prior to the estate tail, in substitution of all the uses of the settlement. It is in the nature of a condition, that runs with the land, and not a collateral condition or limitation taking effect, when the event happens, upon which the estate tail is

made to determine. The execution of the power, although it over-reaches the estate tail, cannot be said to determine it; inasmuch, as the uses created are prior in limitation to the commencement of the estate tail; and we think, that, in order for the recovery to bar, it is necessary, that the use, to arise under the power, should operate, strictly speaking, as a remainder *upon [*493] the particular estate. It is impossible to contend, that all contingent uses over-reaching an estate tail are barable by a recovery; as many cases will suggest themselves, where the contrary is obvious; such as contingent remainders to the unborn children of a prior tenant for life. The distinction, which we have noticed, between a condition, and what is commonly termed a conditional limitation, is commented upon in some MS. observations of the late Mr. Sergeant Hill, in the margin of the case of *Page v. Hayward* in the second volume of his *Sal-keld's Reports*; and they are so applicable to the present question, and appear to us so well founded, that we annex a copy of them to our opinion.

The distinction in the case of *Page v. Hayward*, is also adverted to in Mr. Sugden's *Treatise on Powers*, p. 78, second edition, where it is suggested, that the estates created under the power may be considered a *charge* upon the estate tail; which seems another expression for the construction we have adopted.

Mr. Sugden then states several cases, in which, under a contrary construction, every purpose of the power might be defeated; and many others might be added.

If we are mistaken in considering it clear, that the power is not destroyed by the recovery, there can be no doubt, that a very great number of *titles will be [*494] open to the objection; as the doctrine, that powers annexed to the estate of a tenant for life may be kept alive by his reserving a reversion, in conveying to the tenant to the *præcipe*, was an established one in the time of Mr. Booth, and it has since been acted upon by the most eminent conveyancers. We believe we might say, that the practice has been universal.

We have seen MS. precedents of drafts settled by Mr. Booth, of the deeds executed for barring an entail of

estates, in which the Marchioness G., then the wife of the Earl of H., was tenant for life, with remainder to her first and other sons successively in tail, with remainder to her first and other daughters successively in tail; and for resettling the estate on the marriage of Lady Annabella G., the eldest daughter of the Earl of H., by the marchioness, the deed making the tenant to the præcipe, contains the following recital: "And whereas there is not any issue male of the said J., Marchioness G., and therefore the said P., Earl of H., J., Marchioness G., and the said Lady Annabella G., who has attained her age of twenty-one years as hereinbefore is mentioned, are desirous of suffering common recoveries of the said manors &c., and of barring the estate tail, so vested in the said Lady Annabella G., and all the remainders over, and the reversion and remainder in fee, which was so limited to the right heirs of the said Henry, Late Duke of K.; but without prejudicing or disturbing any of the precedent uses, *estates, or charges in and by the said indenture of the 26th June 1736, and the said will, &c., or any of them, expressly or by reference, limited, created, or declared, prior to or before the said remainder or limitation, to the first daughter of the body of the said J., Marchioness G., by the said P., Earl of H., begotten, or prior to or before the said remainder or limitation to the said Lady Annabella G., and the heirs of her body lawfully issuing, and without prejudicing or disturbing any of the powers or privileges to the said precedent uses or estates annexed or belonging; all which precedent uses, estates, powers, and privileges, are intended to be corroborated and confirmed by the common recoveries so intended to be suffered." And by the operative part of the deed, "in order to bar, &c., all estates tail, &c., but without prejudicing or disturbing the said uses, estates, and charges, prior, &c., or any of the powers or privileges to the precedent uses or estates, or any of them, annexed or belonging, and to the intent that the said manors, &c., but subject and without prejudice to the uses, powers, &c. (using the same words as before,) may be limited to the uses, &c., after mentioned;" the earl and marchioness, and Lady A., join in conveying by lease and release to

the tenant to the *præcipe*, during the joint lives of himself and the marchioness; and the recovery is directed to enure, — “in the first place, for corroborating, strengthening, and confirming the said uses, estates, &c. precedent to, or before, the limitation to the first daughter of the body of the *said marchioness, and the heirs of her body issuing, and for corroborating, strengthening and confirming the several *powers* and *privileges* to the same precedent uses, estates, &c., belonging or annexed; and after the determination of the said several precedent uses, &c., and subject to the said preceding uses, &c., to such uses as the said earl and marchioness and Lady Annabella should appoint, and in default of appointment to the uses therein mentioned.”

By a deed of appointment executed after the recovery was suffered, the estates were resettled, pursuant to articles on the marriage of Lady Annabella with Lord P. By this deed, after reciting the deed to make the tenant to the *præcipe*, and the marriage articles, the earl and marchioness, and Lady Annabella, then Lady P., “in exercise of their power, appoint that all the said manors, &c., shall, from and after the decease of the said marchioness, and after failure of issue male of her body (but nevertheless, without prejudicing or disturbing any of the *powers* or *privileges* to the said precedent uses or estates annexed belonging) remain and continue to the uses therein mentioned.”

We have given a full statement of the above precedents, on account of the great authority of Mr. Booth on all questions in conveyancing; and we must observe, that the principles on which these deeds were grounded, seem to have been *adopted as a kind of text law [*497] by modern writers. They are stated and commented upon by Mr. Butler, in his notes to Co. Littleton, 203, b. He observes, “This continues the old reversion in the grantor or bargainer, and preserves the powers relating to his original estate.” Mr. Cruise, in his Digest, vol. iv. p. 335, gives the same precept as to the mode of suffering recoveries, “in order to preserve the powers of the tenant for life, by leaving the reversion in him.” Mr. Preston also, in his Treatise on Conveyancing, 1,

108, recommends that the conveyance to the tenant to the præcipe should be confined to the joint lives of the party and tenant, so as to leave a reversion in the owner of the particular estate. "This mode of limitation," he says, "will not only guard against the merger of the estate of freehold, but will, in *the most effectual manner*, guard against the destruction of all powers, &c., since they will remain annexed to the reversion." The practice is also noticed by Mr. Sugden, in his Treatise on Powers, p. 55, second edition; "So where he (the tenant for life) joins in a common recovery, the *universal practice* is, to convey only during the joint lives of himself and the tenant to the præcipe: and it is also customary in these cases to insert an express declaration, that the conveyance shall not affect, but, on the contrary, be subservient to, the power." And, after noticing that these precautions apply to powers in gross, as well as to powers appendant, he [*498] adds, "And, as *the grantee takes the estate subject to the power, no fraud is committed on him; and the power, therefore, may, it should seem, be executed in the same manner as if the donee had not parted with any portion of his estate."

We refer to Mr. Booth and the writers we have named, in order to show, what infinite danger would happen to titles, if the doctrine and practice so sanctioned should now be considered erroneous, and that it is not on slight grounds that it ought to be impugned. We are not aware of any recent decision, which has altered the law on the subject; and we must say, that we entertain no doubt on the point.

We are also of opinion, that the deed of re-settlement did not operate as an extinguishment of the power.

The principal objection is, that the trustees are made to convey the legal estate vested in them. In answer to this, it is to be observed, that the conveyance was by lease and release, and that the use was re-limited to the trustees for the same estate; so that they were in of the old use; and consequently the power could not be affected by their conveyance. We consider this so clear, as not to require an authority. Yet we cannot forbear observing, that Mr. Sugden, in his Treatise on Powers, p. 59,

has suggested a similar mode of *removing an objection, which it appears had been made to a title [*499] before him. His words are, "But in order to obviate all difficulty, it was recommended that A. should appoint the estate to herself for life. She would then be in of her old use, and might well execute her power. It would be the mere case of a conveyance of the life estate, by an innocent conveyance to the releasee, to the use of herself for life. The use she would take under the conveyance, would, in no respect, be different from the use which was before vested in her, and the express limitation of the use would not render it a new one."

If this were otherwise, still we think, that the power was not extinguished, on the principle, that although appendant, with reference to the estate of the trustees, it is in gross or collateral so far as concerns the other uses of the settlement. The case of *Slater v. Edwards*, in Hardress, is a direct authority, that notwithstanding an alienation of the whole estate of the donee of the power, by an innocent conveyance, the power may be exercised, so as to over-reach estates, as to which it is collateral, although it will have no effect to the extent of the estate conveyed by the donee. In the cases where an alienation by the donee of the power of his whole estate by an innocent conveyance, has been held to destroy or extinguish the power, the nature of the power, or of the interest conveyed, has been such, as to render it impossible that the power should afterwards *be exercised without defeating the parties' own conveyance ; as a power for tenant for life to grant leases in possession, where no leases could be granted, without their commencing during the life of the donee ; or a limitation to such uses as A. shall appoint, and, in default of appointment, to A. and his heirs, where the whole fee passes by the conveyance.

It does not appear to us that any inference arises from the insertion in the settlement of a new power of sale and exchange, that the old one was intended to be abandoned. The new power may have been intended to operate, whenever, by the determination of the preceding estates, under the original settlement or other-

wise, there should be no necessity to resort to the old power. But we do not consider it necessary to reason upon inference of intention, in a case where express words are used, denoting that the uses created by the new settlement, are to be subject to the powers in the original settlement, and where the objects proposed could not otherwise be effected. With respect to the objection, that according to the construction contended for, the conveyance was to be subject to the very estates, which were to be conveyed by it; it is sufficient to say, that as to these estates no conveyance was intended, the assurance being meant only by way of corroboration, as the deed expresses.

*We recommend that the points at issue should
[*501] be tried in an action for the deposit.

(Signed,) F. W. SANDERS.
 LEWIS DUVAL.

LINCOLN'S INN,
11th April, 1816.

MS. note of Mr. Sergeant Hill, on the case of *Page v. Hayward*.

"It is contrary to every principle of law and justice, that a recovery suffered by tenant in tail should discharge the estate tail of any condition, or conditional limitation, to which the estate tail was subject; but it is clear, that if there be a tenant in tail, with remainder over on a contingency, a recovery by tenant in tail will bar the contingent remainder; but the recoveror comes in under the tenant in tail, and subject to all charges to which the estate tail was subject; and there is no colour for the opinion of Hale, as reported in 1 Mod. 111, that a recovery by tenant in tail will destroy any condition to which the estate tail was subject. Yet that mistake is followed here by Holt, and in the 2nd of Atk. 591, by Lord Hardwicke. What is said in 1 Mod. 111, that a recovery by tenant in tail shall bar collateral conditions though annexed to the estate tail, as they are in the cases there put, was extrajudicial; for, as observed 1 Mod. 110, the question there arose about a charge subsequent to the estate tail; and Lord Hale's opinion in page

111, *is contrary to his reasoning in page [*502] 109.⁴

"N.B. Since the above was written, it seems *clear on further consideration*,⁵ that where an estate is devised to one in fee-simple, upon condition, and in case the condition be not performed, then to another; this, if within due bounds, will be good as an executory devise, and therefore not barable by recovery; because no executory devise can be barred by recovery (at least not unless the person to whom the executory devise is made is vouched in the recovery); yet, if in such case, the first devise be *not a fee-simple*, but a *fee-tail*, then the devise over will operate, not by way of executory devise, but as a contingent remainder; and consequently a recovery suffered by tenant in tail before the condition, or contingency, happens on which the remainder is to take effect, must extinguish it, because a remainder cannot, though an executory devise may, and always does, subsist without a particular estate to support it; but where lands are devised in tail on condition, and if the condition be broken, then to B.; this, though called a condition, is by reason of the devise over a limitation, or, as it is frequently called, a conditional limitation, and the devise over being limited *after a particular estate (*viz.*) [*503] an estate tail which is capable of supporting it, as a contingent remainder, it therefore operates as a contingent remainder, and therefore a recovery suffered (before breach of condition) by the tenant in tail, must destroy the contingent remainder by destroying the particular estate, which supported it before the contingency happened; that is, before the remainder vested; for it is a clear rule, that every remainder must vest during the particular estate, or *eo instante* that it determines, or otherwise it can never vest at all."

⁴ [Earl of Scarboroug *v.* Doe dem. Savile, 3 Adol. & El. 897.]

⁵ These words are interlined in the Sergeant's own hand, and probably were added some time after the note was written.

No. VIII.

Power to appoint New Trustees.

WHEN new trustees are appointed under a power in the place of deceased or retiring trustees, with the single view of exercising powers of sale, exchange, or partition, there can be no doubt, that by the mere effect of the appointment, the new trustees may be qualified to exercise such powers. But it is usual in all settlements to provide upon each nomination, that every legal interest or estate vested in the deceased or retiring trustees, should be conveyed in such manner, that it may vest in the newly appointed trustees: for in the generality of settlements terms of years are created, and estates are vested in trustees to preserve contingent remainders, or estates for other purposes may be vested in the trustees, [*504] who are *to exercise the powers of sale, exchange, or partition, which it would be proper to have vested in the new trustees. Powers therefore, of this kind, provide, that when, and so often, as any new trustee or trustees shall be nominated and appointed under the power, all the trust estate and premises, the trustee or trustees of which shall die, desire to be discharged, or refuse or become incapable to act, shall be thereupon conveyed, transferred, and assured in such manner, that the same shall be effectually vested in the newly appointed trustees to, for, and upon, the same uses, trusts, and purposes, and under the same powers as were before limited by the settlement; and hence where the deceased or retiring trustees, to whom powers of exchange, sale, or partition have been reserved, are also releasees, or grantees to uses, it has been argued, although I think erroneously, that to enable the newly appointed trustees to exercise powers of sale, exchange, or partition, two circumstances are necessary; first, that the new trustees should be duly appointed; and secondly, that the trust estates should be conveyed to them and their heirs to the uses of the settlement, so as to give them a seisin to uses. In order to obviate the force of

this argument, if it has any, the provisions noticed in the following form of a power may be adopted :

Provided always, and it is hereby agreed and declared, that in case the trustees in and by these presents nominated and appointed, or any of *them, or any succeeding, or other trustees or trustee of said trust estate and premises, to be nominated as hereinafter mentioned, or their, or any of their heirs, executors, or administrators, shall happen to die, or be desirous to be discharged of and from, or refuse or become incapable to act in, the trusts or powers hereinbefore expressed, declared, and contained, before the same trusts and powers shall have been fully performed, exercised, or satisfied, then and so often as the same shall happen, it shall and may be lawful for the said A. B. and C. D. during their joint lives, and after the decease of either of them, to and for the survivor of them, during his or her life, and after the decease of such survivor, then to and for the surviving, or continuing, or other trustee or trustees of the premises, the trustee or trustees of which shall so die, desire to be discharged, or refuse, or become incapable to act as aforesaid, by any deed or writing under their, his, or her hands and seals, or hand and seal, to nominate, substitute, and appoint any other person or persons to be a trustee or trustees in the place and stead of such trustees or trustee so dying, desiring to be discharged, or refusing, or becoming incapable to act as aforesaid ; and that when and so often as any such new trustees or trustee shall be nominated and appointed as aforesaid, all the said trust estate and premises, the trustee or trustees whereof shall so die, desire to be discharged, or refuse, or become incapable to act as aforesaid, shall be thereupon with all *convenient speed, transferred, assigned, and assured respectively (according to the nature and tenure thereof) in such sort and manner, and so that the same shall and may be legally and effectually vested in the newly appointed trustee or trustees jointly with such of the former trustees, as shall be willing and capable to act; or in case there shall be no continuing former trustee, then in such newly appointed trustee or trustees only; to, for, and upon the uses, trusts, intents, and purposes

hereinbefore limited, expressed, declared, and contained of and concerning the same; and that the new trustee or trustees, who shall be appointed in the room or stead of the said E. P. and G. H., or either of them as aforesaid, either alone or jointly with such of them the said E. P. and G. H. as shall continue to act, shall and may, either before or after any such conveyance or assurance as aforesaid, exercise all or any of the powers or authorities hereinbefore reserved or given to the said E. P. and G. H., and the survivor of them, and the heirs of such survivor as aforesaid; ⁶ [*507] and that every such *new trustee shall and may in all things, and in all respects, act and assist in the management, carrying on and executing of the trusts, to which he shall be so appointed, as fully and effectually and with the same power and powers, authority and authorities, as if such new trustee had been originally, by these presents, nominated and appointed, and as the said

⁶ Instead of the words in italics, the following clause may be inserted :—

And that to enable any such new trustee or trustees to exercise any of the powers aforesaid, relating to the estates hereinbefore limited in strict settlement, it shall not be necessary to invest him or them with such seisin or possibility of seisin to uses of and in such estates, or any of them, as may, or shall at any time, be vested, or have been vested, in the trustee or trustees, in whose room such new trustee or trustees shall be appointed as aforesaid.

Or, in lieu of the above, the following form may be adopted :—

And that in order that such hereditaments may be legally and effectually conveyed to, and vested in, such new trustee or trustees jointly with such former trustees or trustee, or in such new trustees or trustee only as occasion shall require, it shall be lawful for the person or persons nominating, substituting, or appointing such new trustee or trustees, under, and by virtue of the power and authority hereinbefore for that purpose contained, by any deed or deeds, instrument or instruments in writing, to be by him or them sealed and delivered in the presence of, and attested by, two or more credible witnesses, to revoke, determine, and make void the uses, trusts, powers, and agreements, in and by these presents limited, created, declared, and expressed, of and concerning the hereditaments hereinbefore limited or intended to be limited in strict settlement, or any of them, or any part thereof, and by the same or any other deed or deeds, instrument or instruments in writing, to be by him or them sealed, delivered, and attested as aforesaid, to limit, declare, direct, or appoint, any other use or uses, estate or estates, trust or trusts, or concerning the hereditaments, or any of them, or any part or parts thereof, which it shall be thought necessary or expedient to limit, declare, direct, or appoint, for the purpose of conveying or vesting the same premises to or in such new trustee or trustees jointiy or solely as occasion may require.

If the latter form be adopted, two instruments will be necessary to exercise the power; first, a deed appointing the new trustee, and revoking the uses of the settlement, and appointing the settled estate to A. B. and his heirs, to the intent, that he should reconvey the same to the old and new trustees, and their heirs, to the subsisting uses of the settlement; and secondly, a reconveyance accordingly by A. B.

trustees of the same *trust estate and premises [*508] named in these presents are, or would be, enabled to do, or might, or could have done, under, or by virtue of the same, or any clause, power, or proviso hereinbefore contained or implied; or otherwise, as if such original trustees had been then living and continuing to act under, or in execution of the trusts, powers, and authorities reposed in, or reserved to, them in and by these presents.

END OF VOL. I.

AN ESSAY
ON
USES AND TRUSTS,
ETC.

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AN ESSAY
ON
USES AND TRUSTS,
AND ON
The Nature and Operation
OF
CONVEYANCES AT COMMON LAW,

AND OF THOSE WHICH DERIVE THEIR EFFECT FROM THE STATUTE
OF USES.

BY
FRANCIS WILLIAMS SANDERS, ESQ.,

The Second American Edition,
WITH REFERENCES TO LATER ENGLISH AND AMERICAN CASES,
FROM THE FIFTH ENGLISH EDITION.
WITH ADDITIONAL NOTES AND REFERENCES,
BY GEORGE WILLIAMS SANDERS, ESQ.,
OF LINCOLN'S INN, BARRISTER;
AND
JOHN WARNER, ESQ.,
OF THE INNER TEMPLE, BARRISTER.

IN TWO VOLUMES.

VOL. II.

PHILADELPHIA:
ROBERT H. SMALL, LAW BOOKSELLER.

1855.

Entered according to Act of Congress, in the year 1855, by

ROBERT H. SMALL,

In the Clerk's Office of the District Court for the Eastern District of Pennsylvania.

JUN 9 1870

KITE & WALTON.

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FEOFFMENT.

(1.) I **MAY** describe a feoffment to be a conveyance of *corporeal* hereditaments from one person to another, by delivery of the possession upon, or within view of, the hereditaments so conveyed.

The ceremony used in such act of delivery is called *livery of seisin*.

(2.) As feoffments are the most simple, so they are the most ancient species of conveyance. The original method of acquiring property in lands was by occupancy; and the first mode of transferring it from one man to another was by the public and solemn delivery of the possession. Sir Edward Coke has observed,¹ that when the kinsmen of Elimelech gave unto Boas the parcel of land, that was Elimelech's, he took off his shoe, and gave it unto Boas in the name of seisin of the land (after the manner of Israel,) in the presence, and with the testimony, of many witnesses; *and that when Ephron enfeoffed [*2] Abraham of the field of Machpela, he said to him, *Agrum tradō tibi*, &c.; I deliver this field to thee.

This mode of conveyance, by actual delivery of the land, derives its present name of *feoffment* from the introduction of the feudal system in England; for it is the *donatio feudi* according to its acceptation with us.² At what period, however, whether before or after the Norman Conquest, we are to date the establishment of the feudal tenures in this country, has been a point so

¹ Co. Litt. 49, b.

² Co. Litt. 9, a.

much disputed, that it is impossible to form a decided opinion upon it without differing from some of the most respectable authorities.³

(3.) The conveyance by feoffment was introduced into this country, when men were scarcely acquainted with the use of letters; it was necessary, therefore, that [*3] it should be on or near to *the land, in order that the tenants of the manor, who in those days determined in the lord's court all controversies relating to such translation, might be witnesses to the livery. After the Conquest, charters of feoffment began to be in use; at first, however, they were drawn up in no regular form; nor was there any uniformity in the style till the reign of Edward I. Still the charter of feoffment was by no means a necessary part of the conveyance; though we may conclude, that men found by experience, that it was the most sure way to authenticate and secure the titles to their property. At all times, a livery of seisin, made in pursuance of a charter, was less liable to disputes concerning its validity, than that made on a conveyance without a deed. The conveyance of feoffment in writing served, as Bracton observes,⁵ *ad perpetuam memoriam, propter brevem hominum vitam, et ut facilius probari possit donatio.* The legislature has, however, rendered a charter of feoffment as necessary as the livery of seisin. For by the Statute of Frauds,⁶ there can be no conveyance of lands or hereditaments, for more than three years, without writing.

(4.) To every feoffment, whether made to create an estate in fee-simple, fee-tail, or for life, livery of seisin is [*4] indispensably necessary;⁷ and it properly *denotes the willingness of the feoffor to part with, and of

³ It is worthy of notice, that the term *feodum*, or *feof*, was not always applied to lands. Thus, in a convention made between Henry the First, and Robert Earl of Flanders, dated at Dover the 16th of the calends of June, 1101, wherein the earl engages to assist Henry, *ad tenendum et defendendum regnum Angliae, contra omnes homines, qui vivere et mori possint*, the King of England, on his part, engages to pay the earl *unoquoque anno 400 marcas argenti in feodo.* Vide Acta Regia, 8, in notis. However, when we speak of a *feoffment*, we must understand the word as applying to a conveyance of *lands* only. For Britton on this head tells us, that "*Don est un nosme general, plus que n'est feoffment; car Don est general a toutes choses moebles, et nient moebles, et feoffment est riens farsque de soil.*" Wing. Brit. Ca. 34.

⁴ 2 Bac. Ab. 483.

⁵ Bract. lib. 2, fol. 33, b.

⁶ 29 Car. 2, c. 3.

⁷ Shep. T. 206. [But it is a rule of law, that where a deed of feoffment has

the feoffee to receive the estate, of which the feoffment is made.³ This livery of seisin is divided into livery *in deed*, and livery *within view*, or *in law*.

(4.) 1. Livery *in deed* is performed by the feoffor's coming upon the land, and delivering to the feoffee a clod, branch, or turf, there growing, "In name of seisin of all the lands and tenements contained in this deed;"⁴ or livery *in deed* may be given by the feoffer's delivering the *charter* upon the land, in the name of livery of seisin of all the lands comprised in the deed;⁵ or by words only, without any act of delivery, as if the feoffer, being upon the land, says to the feoffee, "Enter you into this land, and take seisin of it in the name of all the land contained in this deed."⁶ But in all cases, where the delivery of the charter is to serve as livery of seisin, it is necessary that the charter should be delivered in the *name of seisin*, &c. &c.; for otherwise it will serve as a *delivery to perfect the *deed*, and not as *livery of seisin*.⁷ If the livery of seisin be of a house, the feoffer must take the ring, or latch of the door (the house being quite empty,⁸) and deliver it in the form above-mentioned; and then the feoffee must enter alone, shut the door, then open it, and let in the others.⁹

In all cases of livery of seisin by deed, a man may either *give* or *receive* it by attorney.¹⁰ The power to *give* or *receive* the livery must be by *deed*, in order that it may appear whether it be pursuant to the authority.¹¹ If the feoffment be by *deed poll*, the letter of attorney may be

~~been followed by possession, a jury ought to presume the livery of seisin to have been duly made, 2 Bac. Abr. 648.]~~

³ West's Symb. Part 1, s. 251. [It is, in fact, by the livery, which is the essential part of the conveyance, that the land passes, and not by the deed of feoffment, which is a mere record of the livery. And it is this circumstance which gave rise to the practice of introducing into all deeds of conveyance, words referring to the conveyance itself as an antecedent act, (as that the grantor *hath granted*, &c.)]

⁴ 2 Black. Com. 315. [Co. Litt. 48, a.]

⁵ 9 Co. 138, a. 2 Roll. Ab. 7, pl. 10.

⁶ 6 Co. 26, b. 9 Co. 137, b. Sed contra, Cro. Jac. 80, pl. 2.

⁷ Co. Litt. 48, a.

⁸ [But the fact of a person happening to be in the house, who is not one of the household of, or placed there to represent, a party having right, will not prevent the effect of the livery. Doe dem. Reed v. Taylor, 5 Barn. & Adol. 575.]

⁹ 2 Black. 315.

¹⁰ Co. Litt. 52, b. 2 Roll. Ab. 8.

¹¹ 2 Roll. Ab. 8, pl. 4, 5.

contained in it; but not so if it be by deed *indented*; unless the attorney be a party to such indenture.⁸ The power of attorney must be executed both in the lifetime of the feoffor and the feoffee.⁹ It is said, that when the king made a feoffment, he used *to issue his writ to empower his sheriff, or other person, to deliver seisin: in time other great men did the same; and this circumstance gave rise to powers of attorney.¹

(4.) 2. The livery *within view*, or in *law*, is made when the feoffor is not actually upon the land or in the house, but being in sight of it, says to the feoffee,² "I give you yonder house, enter and take possession;" or by delivering a charter of feoffment *within view*, says, "I will, that you have the lands that you see there, which are comprised in this deed, according to the purport of it."³ There is this convenience attending the above mode of delivery, that no freehold can be vested before an actual entry made by the feoffee.⁴ Therefore, in case of the death either of the feoffor or the feoffee before entry, the livery is void. It may possibly happen, that the feoffee is prevented from making an actual entry by bodily fear; yet still he may make his *claim*, as near to the land as he dares to venture, which will be sufficient to vest the possession in him, and render the livery complete.⁵ It must be observed, that no livery *within view* can be made by attorney.⁶

[*(5.) If a feoffment be made of lands in several towns in one county, and seisin be given of parcel of the lands in one town, in the name of the lands in that and in the other towns, all these lands of the feoffor will

⁸ Co. Litt. 52, b. Sed contra, Cro. Eliz. 905. 2 Roll. Ab. 8, pl. 12. Shep. T. 217. [It is not now considered necessary that where a feoffment, by deed indented, contains a power of attorney to deliver seisin, the attorney should be a party to the deed. In the case of Doe dem. Maddock v. Lynes, 3 Barn. & Cress. 388, no exception was taken to a feoffment by indenture, on the ground that the attorney to deliver seisin was not a party to it, though the validity of the feoffment was disputed on other grounds.]

⁹ Co. Litt. 52, b.

¹ Butl. note 1. Co. Litt. 271, b. See further as to livery by attorney, Co. Litt. 52, b, note 2. Com. Dig. Feof. B. 3 Ba. Ab. Feof. E.

² Pollexf. 47. 2 Bac. Ab. 485.

³ 2 Roll. Ab. 7, pl. 2.

⁴ Co. Litt. 266, b. Shep. Touch. 217.

⁵ 2 Roll. Ab. 3, (J.) Co. Litt. 48, b.

⁶ Co. Litt. 52, b. Shep. T. 217; and so, it should seem, as to receiving livery. See Co. Litt. 49, b.

pass.⁷ But if a feoffment be made of lands in different counties, livery in deed must be made in each of the counties;⁸ yet livery within view [i. e. one livery] may be made of lands lying in different counties.⁹ So too if livery in deed be made in the name of the whole of a manor, which extends to two counties, livery in one county is sufficient.¹

(6.) The ceremony of livery was first instituted, that the *pares* of the county might, upon any dispute concerning the freehold, be able to judge in whom the right was.² Hence, no estate of freehold can be made to commence *in futuro* by feoffment and livery immediately given thereon.³ But on the creation of a freehold remainder, where there is a preceding estate for years, as a term for three years to A., remainder in fee to B., if livery of seisin, which must be in *deed*, be made to the tenant for years, the freehold is immediately created, and vested in B. during A.'s term.⁴ For this is an estate, though to be enjoyed *in futuro*, yet commencing *in presenti*. But ^{*8]} there would be no notoriety or evidence, if after livery made the freehold still remained in the feoffor;⁵ as where a feoffment is made to B. in fee, his estate to commence seven years from that time, or after the feoffor's death. In such case the investiture would rather create, than prevent, uncertainty.⁶

If a livery be made to a lessee for years, remainder to the right heirs of B., this livery is void; because *nemo est haeres viventis*,⁷ and because it is a rule, that no contingent remainder can be supported without a preceding estate of freehold. But if A. lease to B. for years, on condition, that if B. pay him a certain sum on such a day, then B. shall have the fee-simple; upon livery or seisin to B. the

⁷ Litt. s. 418. 2 Roll. Ab. 11.

⁸ 2 Roll. Ab. 11, pl. 2. Perk. s. 227.

⁹ Co. Litt. 48, b. 2 Bac. Ab. 486.

¹ Perk. s. 227.

² 2 Bac. Ab. 486.

³ Co. Litt. 217, a. 5 Co. 95. 2 Vent. 204.

⁴ Litt. s. 60. 2 Black. 166. Co. Litt. 49, b.

⁵ 2 Roll. Ab. 7, pl. 8. Cro. El. 344.

⁶ [But a future, or springing use, may be limited to arise on a present feoffment, with livery of seisin. As if a feoffment were made to the use of B. after the feoffor's death, the limitation of the future use would be good; and the use would, in the mean time, result to the feoffor. Sir Edward Clere's case, 6 Rep. 18. In this case, however, a present freehold passes to the feoffor to uses by the livery, although the use limited on his seisin is future.]

⁷ Co. Litt. 217, a.

freehold passes to him conditionally.⁸ But if B. had an estate for *life*, ⁹ with a like condition, the livery [*9] would not have carried the inheritance, till the performance of the condition.¹⁰

(7.) As the design of livery was to denote the change of possession, it must follow, that the possession, which is delivered, should be vacant.¹ Therefore, it is generally true, that every feoffor should have *actual* possession;² and where a man has let his lands out on lease, or has them extended on a statute-merchant, &c., he cannot, whilst the lessee or conuzee is in possession, make a valid feoffment, and livery of them.³ But this must be understood where the lessee or tenant is averse to such feoffment and livery; for where he consents, it is clearly good;⁴ and if there be several tenants, there must be as many liveries.⁵ But in speaking of tenants of the lands, tenants at will and at sufferance are not included; for their consent is by no means necessary.⁶ Though [*10] the feoffor's lands are out upon lease, yet if he can obtain a clear and actual possession (though the lessee dissent), the livery is valid; and it is immaterial whether such possession be gained by the lessee's own absence,⁷ or by the ouster of him by the feoffor.⁸ Yet in cases of ouster, and absence of the lessee, the possession of any part of the lands by his wife, children or servants, has been deemed sufficient to avoid the livery.⁹ And as

⁸ Litt. s. 350. [The only reason why, in this case, the inheritance passes immediately to B., and does not await the performance of the condition, is, that the livery must have a present estate of freehold to work upon; and, therefore, where it is not necessary to resort to the conditional estate to find an operation for the livery, (as in the next case put in the text,) or where no livery of seisin at all is necessary, (as where the king makes such a lease with such a condition as above,) or where such a lease with such a condition is made of an advowson, or of any thing else which lies in grant, the inheritance does not pass till the performance of the condition.]

⁹ Co. Litt. 217, b.

¹ [See *Doe dem. Reed v. Taylor*, 5 Barn. & Adol. 575.]

² Co. Litt. 48, b. 2 Roll. Ab. 3, 4. Dy. 33, a. b. Cro. El. 322.

³ See the above cases, and 2 Co. 31, b.

⁴ Co. Litt. 48, b. Dy. 33, a. b. Concerning an implied consent, see 2 Roll. Ab. 5. The consent of the lessee will not operate as a surrender or forfeiture of his lease. *Moor*, 11, pl. 41, 42. 20 Vin. 127, F. Dy. 33, a.

⁵ Dy. 18, a. b. pl. 106. 2 Black. Com. 316.

⁶ 2 Roll. Ab. 4. Dy. 18, b. [The feoffment operates as a determination of the tenancy at will. See *Ball v. Cullimore*, 2 Cro. Mee. & Ros. 120.]

⁷ Dy. 363, a. 2 Roll. 4, pl. 11.

⁸ *Moor*, 91, pl. 226.

⁹ Co. Litt. 48, b. 2 Roll. Ab. 4, 5. Bro. Feof. 66. [*Doe dem. Reed v. Taylor*, 5 Barn. & Adol. 575.]

the servant is supposed to act for the benefit of his master, even his permission will not make good the livery, though indeed the subsequent consent of the master will.³ But the cattle of the lessee continuing upon the land will not affect the operation of the livery.⁴

(8.) A charter of feoffment was found particularly useful in pointing out the certainty of the limitation of the estate intended to be conveyed by the feoffment and livery: for parol limitations, at the time the livery was made, must ever have been liable to objections and disputes. Yet it was said, that the livery would alter and correct the limitation made in the charter of feoffment. *Thus, if the charter had been made in *fee*, and the feoffor had delivered seisin for *life*, the feoffee [*11] could have held but for life.⁵ But at the same time, as the livery was endorsed, it prevented any uncertainty. However, if in that case the livery had been made for *life*, *secundum formam chartæ*, the feoffee would nevertheless have had the *fee*; because the livery then had a reference to the deed, which limited the estate in *fee*.⁶

These remarks, it is hoped, will afford a sufficient knowledge of the general rules relating to livery of seisin. According to the present disuse of the conveyance by feoffment, there are very few other cases to be found on the subject of any real consequence. They, however, who wish to search more minutely into this learning, are referred to the authors cited below.⁷

(9.) Though the conveyance by feoffment is now very seldom resorted to, it is by no means an obsolete conveyance. In some cases it operates as strongly as the conveyances by fine and recovery: in others more forcibly: and the operation of it in those particular instances will be the subject of our inquiries.⁷

*(9.) 1. It has the effect of barring or destroying [*12] contingent remainders depending upon particular

¹ 2 Roll. Ab. 5.

² Ibid.

³ Co. Litt. 48, b.

⁴ Co. Litt. 222, b.

⁵ Co. Litt. 48, a. 222, b.

⁶ Vin. Ab. Feoff. 2. Ba. Ab. Feoff. 2 Roll. Ab. Feoff. Com. Dig. Feoff. West, Symb. pl. 1, a. 235 to 264. Shep. T. 199 to 217.

⁷ [It seems that a feoffment may operate by way of estoppel, at all events so as to bind the future estate of the feoffor during his own life. Litt. 667. Co. Litt. 255, b. 3 T. R. 370.]

estates. This quality is annexed to a fine and recovery, but not to a bargain and sale, lease and release, or grant.⁸ In Archer's case,⁹ where lands were devised to A. for life, and to the next heir male of A. and the heirs male of the body of such next heir male, (which limitation was deemed a contingent remainder to the son of A.), it was determined, that the feoffment of A. destroyed the contingent remainder to his next heir male. So if there be tenant for life, remainder to the right heirs of J. S., and the tenant for life make a feoffment during the life of J. S.; the particular estate is determined, and the contingent remainder to the heirs of J. S. destroyed.¹

(9.) 2. It was observed in a preceding page, that a springing or shifting use cannot be barred by feoffment, fine, or recovery; unless the seisin, out of which it is to be served, be disturbed; as in the case of a covenant to stand seised to the use of such a person upon a particular event: in which, until the contingency happens, the use in fee results to the covenantor; and the covenantor, before the use vests, may by a feoffment prevent its taking effect.² But though a man cannot bar a shifting or future use to a third person, except in the instance [*13] just mentioned, yet he may exclude *himself by a feoffment from all future uses and possibilities. Thus, in a case³ where J. S. covenanted to convey lands to the use of himself in fee, until such time as he the said J. S., his heirs, executors, or administrators, should make default in payment of a certain sum, and after such default to the use of the Queen, her heirs and successors, until her heirs and successors should receive a certain sum; after which period, to the use of J. S. and his heirs for ever; J. S. levied a fine to those uses; and afterwards, being seised accordingly, he *bargained* and *sold* the lands to a stranger. Default was then made in payment of the money; the Queen seized the lands, and granted them over to another and his heirs, *quousque* the

⁸ 3 Wils. 245. See post, *Bargain and Sale, &c.*

⁹ 1 Co. 66, b.

¹ Litt. Rep. 160.

² See *supra*, 149 to 155, vol. i.

³ 1 Leon. 33, pl. 40. See also 1 Co. 174, b. 111, b. 112, a. b. Hob. 337.

money be paid. Afterwards J. S. paid the money; and the question was, whether he could have the lands again, contrary to his own express bargain and sale. It was resolved, that as J. S. at the time of the bargain and sale had an estate in fee, *determinable* upon a default of payment, according to the first limitation of the use; so that determinable fee only passed by the bargain and sale, and not the *new* estate, which accrued by the latter limitation after the money paid, for that was not *in esse* at the time of the bargain and sale: but that if J. S. had conveyed by *feoffment* or *fine*, then he would have barred himself from ever taking under the latter limitation of the use.

*(9.) 3. A feoffment destroys powers *appendant* [*14] and powers in *gross*; but not powers *collateral*:⁴ and it bars the feoffor of all interest in the lands, such as rents, common, and the like;⁵ and also of the benefit of a condition of re-entry, writs of error, and attaint, &c.⁶

So if a man seised of an estate of inheritance in his own right, and possessed of a lease for years *in futuro* in right of his wife, make a feoffment of the land; by the feoffment the term is extinguished.⁷ But in this case, if the grantor had conveyed by bargain and sale, the lease would not have been affected by it.⁸ So it should seem, that if A. be entitled to a rent-charge issuing out of the manor of D. in right of his wife, and afterwards purchase the manor; by a bargain and sale thereof the rent will not pass.⁹

(9.) 4. A feoffment is the only conveyance, by which a tenant for years, by elegit, statute-merchant, or staple, or a copyholder can create an estate of freehold by disseisin.¹⁰ The utility of the feoffment, in this instance, exceeds all other conveyances. As to a recovery, there is an absolute necessity that there should be a tenant of *the freehold, against whom the writ of entry may [*15] be brought: and as to a fine, if a tenant for years, &c., levy a fine without previously created a freehold by

⁴ See *supra*, vol. i. 180, et seq.

⁵ Shep. T. 204.

⁶ Ibid. 204. 1 Co. 112, a. b.

⁷ See Bracebridge's case, Plowd. 422, 423. Moor, 171, pl. 304. 1 Leon. 5.

⁸ Moor, 171.

⁹ 1 Leon. 6.

¹⁰ See Co. Litt. 49, a. 2 Inst. 413.

disseisin, the fine may be avoided by pleading *partes finis nihil habuerunt.*²

To make a feoffment valid, nothing is wanting in the feoffor but *possession*; and when he has it, though it be but a naked one, the livery will create an estate of freehold by disseisin;³ and the estate of freehold thus created will be sufficient, as I have before said, to support a fine levied upon it.

Thus, in a case cited by Mr. Knowler,⁴ where *cestui que use*, before the Statute of Uses, conveyed the use by *bargain and sale*, and afterwards levied a *fine* to a *stranger*: the question was, whether the fine was not void. Neither of the parties had any thing in *use* or *possession*: for by the bargain and sale the use was in the *bargainee*; and consequently, there was nothing remaining in the *bargainor*, nor conveyed to the *stranger*. It was argued, that if the fine were not good, great inconvenience would follow; for that many recoveries had been suffered against the *bargainor*, after he had conveyed the use. To this Fitzherbert replied, that it was the folly of purchasers [^{*16}] that they did not take a *feoffment* from *cestui que use* before the fine was levied: for if they did, the *fine* would be *good*. For his part, he said, he would never purchase any land without taking a *feoffment*; so that he might be in *possession* when the fine should be levied; for then the fine would be *undoubtedly* good. In this case, the feoffment by the *bargainor* after the *bargain and sale*, could not have been warranted by the statute 1 Rich. 3, c. 1, supposing he had made it to the *stranger*; because, after that period, in fact *he was not cestui que use*.

In the case of *Focus v. Salisbury*,⁵ Lord Hale observes, "When lessee for years or at will is to levy a fine, it is usual for the lessee to make a feoffment first, to *displace the other estates*." So Lord Coke, in speaking of a tenant by copy of court-roll, observes, that if he make a feoffment in fee, and levy a *fine*, with proclamations, and five years pass, the lord is barred.⁶

² See 1 P. W. 519. 1 Vent. 241. 2 Atk. 241. 3 Atk. 562. Hard. 401.

³ 1 Burr. 92. Bro. Dis. 64. Bract. lib. 2, fol. 31, a. 11, b. [See post.]

⁴ 1 Burr. 25.

⁵ Hard. 400.

⁶ Co. Law Tracts, 126.

But if a tenant at will, copyholder, or lessee for years, make a feoffment, and levy a fine, and still continue in possession; his payment of rent, or performance of services, will be deemed a fraudulent circumstance, and will prevent the operation of the feoffment and fine in barring the owners of the inheritance. Thus, in Fermor's case,⁷ where R. F., seised of the manor of S., *leased [*17] some lands, parcel of the said manor, to J. S. for *years*; who was also possessed of other lands at the *will* of R. F., and held lands of the said manor by *copy of court roll*; J. S. made a feoffment with livery to C. for life, and then levied a fine with proclamations. J. S. continued in possession, and paid the rents to R. F. And it was resolved, that as the feoffment was made, and as the fine was levied by fraud and covin, the owner of the fee should not be bound by the five years non-claim.

Though a feoffment by tenant for years, &c., will create a freehold by disseisin, which estate of freehold will support a fine, yet a feoffment by tenant in tail in remainder will not create such an estate of freehold as can support a common recovery. This point was settled in the case of *Atkyns v. Horde*;⁸ in which a distinction was made between an actual disseisin and a disseisin at the *election* of the parties. But it does not appear to me, that the distinction there taken was applicable to the case of a disseisin created by a feoffment; the case indeed seems rather to have been determined upon general principles of justice, than from strictly legal conclusions. Lord Mansfield, in delivering the opinion of the court, observed, that if the question had been, whether tenant in tail in *remainder* should by an injurious entry and feoffment acquire a benefit to himself *to the prejudice of [*18] the reversioner; it would have been adjudged, from *eternal principles of justice*, that an act founded on wrong should *not*, by virtue of the *crime itself*, become legal for the author's advantage. "And now," added his lordship, "it is agitated, when common recoveries are established as a *species of alienation*: and the question is, whether the rule of law, which requires the concurrence of the owner of the first estate for life, shall be overturned ?

⁷ 3 Co. 77, a.

⁸ 1 Burr. 60. Cowp. 689.

'Tis better to subvert the rule *directly*, than suffer it to be done by a secret *injurious entry* and feoffment."

The notion of a disseisin at election arose from the circumstance of a man's *supposing* himself to be disseised, when in *fact* he was *not*, for the sake of entitling himself to the easy and commodious remedy by assize of *novel disseisin* (which was the common method of trying titles, till the ejectment came in use,)⁹ instead of being driven to the more tedious process of a writ of entry. The remedy by assize of *novel disseisin* was introduced to redress *actual* disseisins recently committed: and the facility of that remedy induced others who were wrongfully kept out of the freehold (though not by an *actual* disseisor,) to allow or feign themselves to be disseised, merely on account of the remedy.¹

[*19] Mr. Butler,² in a note upon this subject, observes, that "by a disseisin at the election of the party, is not to be understood an act which in itself is a disseisin, but which the party supposed to be disseised may, if he pleases, consider as *not* amounting to a disseisin; on the contrary, every act which is susceptible of being made a disseisin by election, is *no* disseisin, *till* the party in question, by his election, makes it such." The case of *Blundel v. Baugh*,³ is an instance of a disseisin at election. In that case the judges held, that if a tenant at will make a lease for years, rendering rent, and his lessee enter and pay rent, that can be no disseisin, unless at the election of the first lessor. In this case the original act by the tenant at will, viz. the making the lease for years, was not of itself sufficient to create a disseisin; but if the first lessor had feigned himself to be disseised for the sake of the remedy, then it would have become a disseisin upon the election of the first lessor.

It follows, from the above explanation of a disseisin at the election of the party, that every act, which *immediately* of itself creates a disseisin, must be considered as an *actual* disseisin. Now the feoffment of a tenant for

⁹ Burr. 110.

¹ See 3 Black. Com. 170, 171. [The assize of *novel disseisin* is now abolished (by 3 & 4 Will. 4, c. 27, s. 36.)]

² Butl. Co. Litt. 830, b. n. 1.

³ W. Jones, 315, 316. See the cases cited 1 Burr. 111, 112, 113.

years, at will, &c., had the peculiar force of creating an *immediate* estate of freehold in the feoffee, with all the *rights and incidents annexed to it; the estate of [*20] the feoffee became *immediately* subject to dower and curtesy, and the descent upon the heir *immediately* took away the entry of the disseisee.⁴

It was said indeed in the above case of *Atkyns v. Horde*, that where the books speak of an actual disseisin created by the feoffment of a tenant for years, &c., it must be understood of feoffments of *old*, attended with livery, and an *actual* transmutation of the possession; but that conveyances had now languished into *mere form*, and had lost their *efficacy* and *solemnity*.

But Mr. Butler, in the excellent note referred to, has endeavoured to prove (and I think successfully,) that feoffments from the time of Henry the Second (which is prior in point of time to the instances given by the judges as cases of *old* feoffments) to the present period, have not been made with any other solemnities than those with which they are made at present; and of course that the operation and *efficacy* universally allowed them by courts of judicature, and writers of authority, from that monarch's reign, must be ascribed to them *now*. Mr. Butler concludes by observing, that from the authority of Bracton and others, the disseisin produced by *feoffments* must be understood to be an *actual* disseisin, and not a disseisin merely at the *election* of the party; *that how- [*21] ever slender, bare, or tortious, the possession of the feoffor is, his feoffment necessarily and unavoidably vests the freehold in the feoffee, till the disseisee, by entry or action, restores his possession: and that a fine may be levied of, or common recovery suffered upon, this estate of freehold by disseisin; which feoffment, fine, and recovery, will in process of time bar the owner of the freehold and inheritance.

There is a case that must occasionally come before professional gentlemen, which is principally founded on the learning of disseisins;—Suppose A. to be possessed of a term of one thousand years, under a decree of fore-

⁴ See Butl. Co. Litt. 330, b. n. 1.

closure, made perhaps fifty or one hundred years ago; and on account of the great length of time since the term was first created, it is impossible to ascertain the owners of the reversion in fee; in this case, if A. the termor is desirous of obtaining the freehold and inheritance, and for the reasons just given he cannot legally purchase the reversion, he may by a feoffment and fine absolutely acquire the fee; and as the reversioner is here unknown, and as there is no payment of rent, or the like, which would, according to Fermor's case, admit the possession of the reversioner, there can be nothing to obstruct the full force and operation of the feoffment and fine.

In a case of this kind, it seems advisable that the term [^{*22}] should be previously assigned to an "indifferent person; that a feoffment with livery of seisin should then be made and a fine levied. The uses of the feoffment and fine may be declared either to the feoffor or a purchaser; but there should be a declaration of the trusts of the term to attend the inheritance, not generally, but as acquired by the feoffment and fine.⁵

⁵ See Vol. I. 30 to 42. [It has been decided that the expedient suggested in the text for preventing a forfeiture of the term will not have that effect. Lord Dormer's ejectment case, Hilary Term, 1817, cited in 3 Barn. & Cress. 399. Mr. Preston has suggested as the grounds of the decision, first, that it is a fraud on the part of the termor to attempt to gain the freehold; and secondly, that the admission by the assignee, of a title in the feoffee, to the reversion, is an attorneyment to a stranger; and by the rules of the common law, attorneyment by a termor to a stranger is an abandonment of the tenancy, a destruction of the privity between the termor and the reversioner, and a forfeiture of the term.

In the case of *Doe dem. Maddock v. Lynes*, 3 Barn. & Cress. 388, a party possessed of lands for the residue of a long term of years, first assigned the term to trustees, and then made a feoffment: but the term was not assigned to attend the inheritance to be acquired by the feoffment, nor did it appear that the assignees of the term had ever assented to the feoffment. The term was in fact assigned upon certain trusts applicable to personality; and the question was, in substance, between the real and the personal representatives of the feoffor, the former claiming under the feoffment, and insisting that it had destroyed the term. It will be observed, that in the view which the court took of this case, it was unnecessary to decide the question, whether the feoffment operated to give a fee by disseisin against all persons except those who had right; because, the term not having been destroyed, those who claimed under it, adversely to the feoffment, had right. But in the case of *Doe dem. Cooper v. Finch*, 4 Barn. & Adol. 290, Taunton, J., observed, that if the feoffment in the case of *Doe dem. Maddock v. Lynes*, had been made by the trustees themselves, the court might have come to a different conclusion: and the conclusion here contemplated could not have respected the mere forfeiture of the term, since, on that point, the feoffment being made by the parties themselves in whom the term is vested, there can be no room for doubt or speculation; and in the case referred to, the question was not between the termor and the reversioner, but between the parties claiming under the term, and those claiming under the tortious feoffment.

*In *Brandlyn v. Ord*,⁹ Lord Hardwicke said, [*26] "that a fine levied by a *termor* for years is a for-

The late case of Doe dem. *Blight v. Pett*, 11 Adol. & El. 842, in which it was necessary to consider the effect of a feoffment made by a party in whom a term of years was vested, is not conclusive on this particular point, owing to the special circumstances. In that case P. claiming to be entitled in fee-simple under a general devise to him of real estate in the will of a certain testator, (which, however, he was not, the property in question having been purchased by the testator subsequently to the making of his will,) entered, and, together with his wife, made a feoffment and levied a fine. It happened that the feoffor had two legal titles when he entered, one under a long term of years which had been assigned to him, on the purchase by the testator, in trust to attend the inheritance; and another (which was to an undivided share only,) in right of his wife, who was one of the co-heiresses of the testator. It was held that the term had not merged in the freehold as to the undivided share, such freehold being in *auter droit*: and one question was, whether the term was destroyed by the feoffment and fine; and another, whether the feoffment was void. The former question was decided in the affirmative, and the latter in the negative. The court seem to have confined their view of the case to the narrowest possible limits; and the difficulty of ascertaining the precise bearing which the decision has upon the general question, apart from the special circumstances, is enhanced by some apparent inconsistencies in what fell from the court; for whilst, on the one hand, Lord Mansfield's doctrine of *disseisin* at election is referred to with approbation, on the other, the authorities cited by Mr. Butler in his note are recognized; and the tortious operation of the feoffment is ascribed, not to a rightful possession by virtue of the term, but to the possession under the actual entry, the term being put altogether out of sight; though if there be any distinction in this respect between a mere naked possession, and a rightful one, it might be supposed that the latter, even under a term for years only, would be the more efficacious of the two. It is to be observed, that no particular force could be ascribed to the feoffment in consequence of the *seisin* in right of the wife; because when one of several co-parceners enters into the whole, the possession being void, and makes a feoffment in fee, this act subsequent explains the entry precedent, so that by construction of law the *seisin* acquired by such entry was of the entirety (Co. Litt. 374, a.); and the possession must therefore be considered as wrongful from the beginning. "When the husband (of one co-parcener) enters generally, *without* claiming any part in his own name, or *without* making a feoffment in his own name, or any such act, the entry shall be understood to have been made in right of his wife." Moore, 60. See also Doe dem. *Reed v Taylor*, 5 Barn. & Adol. 575. Indeed the circumstance of one co-parcener having a rightful title is an impediment, instead of a help, to the tortious operation of his feoffment of the entirety as against the other co-parceners, on the ground of there being a unity of title between all the co-parceners; and the authorities relative to the effect of such a feoffment turn upon this point—whether the co-parcener making the feoffment has by any sufficient act relinquished the rightful title, and assumed the position of a stranger with respect to the other co-parceners. Neither is any stress to be laid on the fact of there having been, in the case under consideration, no actual entry by the other co-parceners; since the effect of such an entry would but have been to render an actual ouster necessary (Co. Litt. 374, a.); and the question between co-parceners in these cases is, what acts amount to an *adverse* possession by one co-parcener as against the others. (On the question of adverse possession, see the following cases, *Ex parte Hasell*, 3 Yo. & Col. 617; *Denys v. Shuckburgh*, 4 Yo. & Col. 42; *Doe v. Edgar*, 2 Bing. N. C. 498; *Doe v. Gregory*, 2 Adol. & El. 14; *Rex v. Inhabitants of Axbridge*, ib. 520; *Doe v. Edwards*, 5 Adol. & El. 95; *Doe v. Smith*, 8 Adol. & El. 255. See also 3 & 4 Will. 4, c. 27, s. 12.) And probably it was on the ground that the wrongful act explained the entry, and made that wrongful also, that no reference was made in this case to the term of

⁹ See next page.

feiture; but the reversioner has five years *after the expiration* of the term to enter." The rule is confirmed by the case of *Whaley v. Tancred*,⁷ which was that of a feoffment made, and fine levied, by a lessee for years: and the reason of it is, because the lessee is trusted with the possession, and there is a privity between him and the lessor: and, as Lord Hale observed,⁸ it is like a mortgage, where the mortgagor *continuing in possession* levies a fine.

But in the case above stated of a termor after a decree

years as constituting a rightful title to the possession. Upon the whole, therefore, however adverse such a conclusion may appear to the tenor of the expressions used by the court in referring to Lord Mansfield's doctrine, the case of *Doe dem. Blight v. Pett* is perhaps to be regarded as an authority that the feoffment of a party having a naked possession will create an estate of freehold by disseisin; and if that be so, the feoffment of a termor for years in actual possession must *a fortiori* have the same effect, when there is no payment of rent, or performance of services to prevent the operation of the feoffment on the ground of fraud.

It was held in this case that the term, though forfeited by the feoffment, might nevertheless be treated as subsisting by the reversioners, on behalf of whom administration had been taken out to P.; but that circumstance did not prevent the operation of the feoffment by P. as a tortious conveyance.

The decision in *Doe dem. Maddock v. Lynes* may perhaps be considered to have turned on the assumption that the actual possession was in the parties entitled to it, that is, the assignees of the term, who did not concur in the feoffment. The *dicta* of the learned judges relative to the alteration which has taken place in the nature of a feoffment and disseisin, and which are applicable to all feoffments, and not merely to such as are made by parties having no estate of freehold, are entitled to less weight since the decision in *Doe dem. Blight v. Pett*.

With reference to the question as to the propriety of assigning the term before making the feoffment, the practical conclusion to be drawn from the cases is, that such an assignment will not prevent the feoffment from being a forfeiture, unless indeed the assignment be of such a nature as to defeat the very object of the feoffment; and even in that case it is doubtful whether a forfeiture will not have been incurred. See 3 Barn. & Cress. 404, 405. A party entitled to a term of years, therefore, can only create a freehold by disseisin, (if he can do it at all,) by the forfeiture of his term, and at the risk of an entry for such forfeiture. If the termor be willing to incur that risk, (as in the case suggested in the text, where it is impossible to ascertain the owner of the reversion in fee,) he should not make a previous assignment of the term; not only because such assignment would not prevent a forfeiture, but also lest, according to the case of *Doe dem. Maddock v. Lynes*, he might be assumed to have thereby parted with the possession, which (or the attorney of the parties having it) is essential to the operation of the feoffment.

Fines having been abolished, a termor attempting to acquire the freehold must now rely upon the feoffment alone; but the object of adding the fine to the feoffment in these cases, would only have been, to reduce the period within which the reversioner might enter for a forfeiture to five years from the levying the fine, or from the expiration of the term.]

⁶ 1 Atk. 571.

⁷ *Whaley v. Tancred*, 1 Vent. 241. T. Raym. 219. See also *Shields v. Atkins*, 3 Atk. 141, 339, 562. *Pomfret v. Windsor*, 2 Ves. 481.

⁸ Hard. 402.

of foreclosure, there cannot, I conceive, be any privity between him and the reversioner. During the existence of the equity of redemption, there was indeed a privity: but the decree put an end to the confidence between them; at least in the relation of mortgagor and mortgagee. The above case is rather more similar to that put in Margaret Podger's case:⁹ *lessee* for years, and the *lessor*, are *both* disseised, and a fine is levied upon such newly-acquired estate by disseisin; after five years run upon the fine from the time it was *levied, the [*27] lessee and lessor are both barred. Now the feoffment in the principal case after the assignment of the term would create a disseisin, I imagine, not only as against the reversioner, but as against the assignee or trustee¹ of the term. Though the case, cited from Margaret Podger's case, has been doubted,² I do not know that it has been expressly overruled; on the contrary, the distinction appears to have been recognised in *Whaley v. Tancred*.

I shall conclude by citing the opinion of Lord Hardwicke,³ who said, if a man purchase an estate, which he sees himself has a defect upon the face of the deeds, a fine levied will be a bar; for the defect upon the face of the deeds is often the occasion of the fine being levied.⁴

⁹ 9 Co. 105, b.

¹ See 2 Ves. 481.

² 2 Vent. 334.

³ 2 Atk. 631.

⁴ [There is another case, besides those mentioned in the text, in which the conveyance by feoffment is resorted to at the present time: namely, the case of a conveyance by a body corporate. This is because a corporation cannot stand seised to a use, and cannot, consequently, adopt any form of conveyance founded upon the Statute of Uses, as a bargain and sale enrolled, or a lease and release (where the lease is by bargain and sale operating under the statute, and not a common law lease; see post). It has been already stated (vol. i. p. 57), that a corporation could not have stood seised to a use previously to the Statute of Uses; and the reason assigned is, that a *suspense* did not issue against a corporation to compel the performance of the trust. (Gibl. Uses, 5.) "For no confidence can be committed to a corporation, as it is not a natural body which has reason, and is capable of confidence; and their natural body shall not be imprisoned for their corporate body, which is another body." Plowd. 538. And accordingly, in the Statute of Uses, persons only, and not bodies corporate, are spoken of as standing seised to uses; though in the case of *cestui que use*, bodies politic, as well as persons, are mentioned. And this is the chief reason assigned by Bacon (p. 59) why a corporation cannot be seised to a use *since* the statute. Sir Edward Sugden, however, considers it to be established by the case of *Holland v. Boins* (2 Leon. 121; 3 Leon. 175, post), that though corporations cannot take lands to the use of others, they may convey *their own* lands by way of use; and he observes, that the stress which Bacon lays upon the word "person" in the Statute of Uses, is considerably weakened by the decisions upon the

*G R A N T.

THE principal conveyances at common law were by feoffment and grant; the former was applicable to *corporeal*, the latter to *incorporeal* hereditaments; the transfer was complete in the one case by the livery of seisin; in the other, by the delivery of the deed, and in some instances by the additional ceremony of attornment. A grant was therefore said to be a conveyance *in writing* of property, which could not pass by livery of seisin.

The term *grant* is generally applied to conveyances by feoffment, fine, recovery, lease and release, bargain and sale, and covenant to stand seized. But the simple grant at common law is complete without any of the ceremonies peculiar to the above conveyances. It does not require inrolment,⁵ nor a prior lease for years, nor the consideration necessary to establish a covenant to stand seized to uses. Livery of seisin is altogether inapplicable to it, and it is not matter of record.

[*30] *But though the conveyance by grant at common law is confined to property lying *in grant*; yet that kind of property may be also transferred by

Statute of Fines, where that word only is used, and yet it is held to extend to corporations. (Sug. Gilb. Uses, p. 7, n. 1.) It is submitted, however, that there is a distinction between the two statutes in this respect, since the Statute of Uses does mention bodies politic in speaking of *ceutui que use*; from which it may be inferred, that where it omits to mention them, the omission was designed. And indeed, assuming that bodies corporate could not stand seized to a use before the statute, there was a reason for this omission, the statute having dealt with uses as it found them, and being intended to remedy a mischief which did not exist in the case of corporations. The reason assigned for the decision in Holland v. Boins is not very satisfactory. According to the report, "the court utterly rejected the said exception as dangerous; for such" (i. e. by bargain and sale enrolled) "were the conveyances of the greater part of monasteries." This *argumentum ab inconvenienti*, inconclusive as it is, applied exclusively to conveyances since the statute; and therefore the decision cannot be said to be founded upon, or to recognise, the distinction which was alleged in the case to have existed between a conveyance to a corporation to the use of another, and a charge by a corporation of their own possessions with a use to another. Indeed it is difficult to perceive the ground of such a distinction, since a use or confidence, however created, must have been enforced by the *subpoena*. If it be said that the case of Holland v. Boins did not recognise, but establish a distinction, the answer is, that there is nothing in the judgment itself to warrant this view of it; and that, moreover, no such distinction could have originated after the statute, the simple question being, whether the word "persons" in the Statute of Uses includes corporate bodies.]

⁵ See post, sec. 2.

conveyances adapted to the transferee of corporeal hereditaments. I shall, therefore, in this place direct my inquiries, First, as to the several kinds of *incorporeal* hereditaments of a grantable quality, and the several conveyances by which they may be granted: Secondly, as to attornment, and the effect of the Statute of Inrolments and the 4 Anne, c. 16, s. 9, upon the ancient grant at common law: Thirdly, as to the operative words of a grant: Fourthly, as to the operation of a grant by tenant in tail.

(1.) Common of pasture, of turbary, of fishing, and of estovers, may in general be conveyed by way of grant, in fee, for life, or years, from man to man *in infinitum*.⁶ But the books, though not very clear upon the subject, seem to make the following distinctions in respect of common of pasture. Common *appendant* for pasture cannot, by grant or otherwise, be severed from the land;⁷ neither can common *appurtenant*, if it be for cattle *levant* and *couchant*, or without number.⁸ But common *appurtenant* for a *certain number* of beasts may by grant be severed from the soil, and thereby made common *in gross*.⁹ As to *common *in gross* in fee, it may be [*31] granted over, though it be *without number*:¹ but it is said, that a grantee *for life*,² or *years*,³ of common of pasture (which must be understood of common *in gross*) for cattle without number, cannot transfer the same; unless the original grant be made to him *and his assigns*.⁴

Common, of the grantable quality just described, may

⁶ Shep. T. 238, 239.

⁷ Perk. s. 104. See Daniel v. Hertford, Cro. Car. 542.

⁸ Drury v. Kent, Cro. Jac. 15. 1 Roll. Ab. 402.

⁹ Ibid. and see Spooner v. Day, Cro. Car. 432.

¹ 2 Roll. Ab. 46, pl. 15. [But see 1 Lord Raymond's Rep. 407. It has been said that there cannot be any common in gross without number; (Mellor v. Spateman, 1 Saund. 343). The meaning of this probably is, that a right of common in gross, *sans nombre*, is not for an unlimited, but for an *indefinite* number of cattle. There is certainly a limit to the number, since the grantee of this right must leave sufficient common for the lord, Roll. Abr. 899 (5); and, it is presumed, also for the other commoners, for a like reason. In the case of common appurtenant for an unlimited number of cattle, the measure of profit which the commoner is to take is, as in the case of common appendant, *levancy* and *couchancy*. Bennet v. Reeve, Willes, 227. Roll. Abr. 398 (3); 399 (5). Drury v. Kent, Cro. Jac. 15.]

² Perk. s. 103.

⁴ Sed quære, and see Roll. supra.

³ 2 Roll. Ab. 46, pl. 16.

be transferred by grant at common law;⁵ or it may be extinguished by a release to the tenant of the land;⁶ and common *certain* may be granted by fine,⁷ though not by recovery.⁸ It seems doubtful, whether, *before the Statute* [*32] of **Uses*, common of pasture could have been conveyed by bargain and sale, or covenant to stand seized;¹ but as the statute comprises all kind of *incorporeal* property, which may lawfully be granted by one to another, it will now pass by either of those conveyances.

[*33] A rent *in esse* may be granted or assigned, *even before the grantor has seisin of it;² but not during its suspension;³ and a rent-charge may be conveyed by fine⁴ and recovery,⁵ lease and release, bargain and sale, and covenant to stand seized,⁶ as well as by the grant at common law.

So, a rent may be reserved on, and created by a fine,⁷ bargain and sale,⁸ and, consequently, a lease and release. It may also be reserved out of the estate or seisin of a

⁵ See Litt. s. 617. West, Symb. pl. 1, s. 294.

⁶ Shep. T. 322.

⁷ Shep. T. 10. 1 Cruise, 121.

⁸ Pig. 96. 2 Cru. 168. [The reason assigned why a recovery could not be suffered of certain things was, that they were not in demesne, but in profit only. Pigot, however, adds (p. 96), that use had altered this in several points; and after stating that a recovery may be of an advowson, or of an annual pension, "because common recoveries are common assurances," he refers (amongst other authorities) to Pop. 22, where it was said that there is a great diversity between a common recovery, which is an assurance between parties, and a recovery which is upon title; and that it hath been common to put in common recoveries, advowsions, commons, warrens, and the like, and yet always allowed. And see also the resolutions in the same case, 5 Co. Rep. 40, where it is said, with reference to this point, "otherwise no assurance could be of an advowson, commons in gross, &c., to bar remainders or reversions expectant on estates tail; the same law of common of pasture, franchises, liberties, and privileges, as to have felons' goods, waifs, strays," &c. And upon this principle it is probable that the alteration in the original usage would have been extended so far as to allow of common recoveries being suffered of every entailable hereditament, though lying in profit only, and not in tenure.]

An annuity limited to one and his heirs, and not issuing out of lands or tenements, although descendible to the heirs, is not a rent, nor realty, but personal estate, and is not within the statute *de donis*. If, therefore, such an annuity be settled on A. and the heirs of his body, this is a fee-simple conditional at the common law, the remainder over being void; and A. having had issue, may bar the possibility of reverter by a common assignment. *Earl of Stafford v. Buckley*, 2 Ves. sen. 170. *Aubin v. Daly*, 4 Barn. & Ald. 59. *Radburn v. Jervis*, 3 Beav. 450.]

¹ See W. Jones, 118, 127. Bro. Tit. Feof. al. *Uses*, pl. 10.

² Shep. T. 238. Perk. s. 91.

³ Shep. T. 233.

⁴ Shep. T. 11.

⁵ See Pig. 97.

⁶ See *Lade v. Barker*, 2 Vent. 260, 266.

⁷ Shep. T. 5. 2 Roll. Ab. 18.

⁸ Co. Litt. 144, a.

recoveror in a common recovery.⁹ But the grant of a rent-charge out of lands, of which the grantor is not seised at the time of the grant, is void; though the grantor should afterwards purchase the same lands:¹ unless perhaps the grant be by fine *executory*.² So, no rent can be reserved out of a rent,³ or other incorporeal hereditament;⁴ and if a disseisee release to his disseisor, reserving a rent, such reservation is void.⁵

*Vested remainders *in fee*, and reversions, may [*34] be granted or transferred by grant,⁶ bargain and sale,⁷ lease and release,⁸ covenant to stand seised,⁹ fine,¹ or a release to the particular tenant;² but not by a recovery,³ nor feoffment. So a remainder *in tail* can only be conveyed by fine.⁴ As to contingent remainders, they may be destroyed, as I have before observed, by feoffment, fine, or recovery; but they can only be conveyed by fine by way of *estoppel*, and perhaps by a common recovery.⁵

⁹ Cromwell's case, 2 Co. 69, b. 72, b.

¹ Perk. s. 65.

⁸ Ibid. 65, 66; and see Shep. T. 11, 243.

² Shep. T. 238.

⁴ Co. Litt. 144, a. [See stat. 5 Geo. 3, c. 17, as to leases, with reservation of rent, of tithes and other incorporeal hereditaments, by ecclesiastical persons.]

⁵ Co. Litt. 144, a.

⁶ Litt. s. 568.

⁷ Vaugh. 51.

⁸ Butl. Co. Litt. 270, a. note 3.

⁹ 5 Co. 8, b. 11 Co. 46, b. 47, a.

¹ See Shep. T. 13.

² Litt. s. 575.

³ 2 Cru. 30, 31.

⁴ 3 Co. 84, a. [A grant by tenant in tail in remainder would have the same effect as a conveyance by bargain and sale, or lease and release, of tenant in tail in possession; that is, it would pass a base fee determinable by the death of the tenant in tail without issue. *Ex parte Boehm and another In re Bennett*, 5 Mad. 124. See also *Doe v. Woodroffe*, 10 Mee. & Wels. 608.]

⁵ See *Feeare, Cont. Rem.* 537, 4th edition. *Weale v. Lower*, Poll. 54. [The fine in this case, although it could only operate by estoppel until the contingency happened, had afterwards an ulterior operation; the estate which, upon the happening of the contingency, became vested, fed the estoppel, and the fine then operated upon that estate, as though the estate had been vested in the cognizor at the time the fine was levied. See *Doe dem. Christmas v. Oliver*, 10 Barn. & Cress. 181. It has been contended that, because a fine operated as an estoppel in the case of a contingent remainder, and because an indenture may operate as an estoppel, (*Bensley v. Burdon*, 2 Sim. & Stu. 519,) therefore, an indenture of grant, executed by the owner of a contingent remainder, or an executory interest, would transfer such contingent remainder, or executory interest, to the grantees. But it must not be supposed that an indenture can have such an operation where the contingent remainder is granted *so nomine*. An innocent assurance, which passes nothing but what the grantor had at the time, cannot amount to an estoppel by virtue of any operative words contained in it. And it is a rule, that an estoppel should be certain to every intent; and, therefore, if the thing be not precisely and directly alleged, as an averment of seisin in the grantor, or be mere matter of supposal, it shall not be an estoppel: nor shall a man be estopped where the truth appears by the same instrument, or that the grantor had nothing

[*35] The interest which a lessee has in his *lease before entry is capable of being assigned.⁶ But if A. make a lease for forty years to B., and it is covenanted, that if the premises be well repaired at the expiration of the term, the lessee shall hold over for a further term of years; it seems doubtful, whether the interest of the lessee in the second term be assignable *at law*.⁷

to grant, or only a possibility. See Co. Litt. 352, b.; Right dem. Jefferys v. Bucknell, 2 Barn. & Adol. 278. Wherever, therefore, the grant of one entitled to a contingent remainder discloses, as it, of course, usually does, the real nature of the grantor's title, it will be proper to adopt that form of assurance which has been substituted for the fine, that is, a deed inrolled.

A surrender of copyholds cannot operate by way of estoppel. Doe v. Wilson, 4 Barn. & Ald. 313.]

⁶ Co. Litt. 46, b.

⁷ See Skerne's case, Moor, 27. [A remainder, properly so called, in a term, is the residue of the term after a certain definite portion of it has been subtracted; as, for instance, the last ten years of a term of twenty years after the first ten years have been granted away. And such an interest is, even according to the old authorities, assignable at law as well as in equity. Sheriff v. Wrotham, 1 Cro. Jac. 509. But where a term of years is made the subject of successive limitations, and the interest first limited is of uncertain duration, as where the term is given to A. for life, and after his decease to others, all the limitations after the first are called possibilities, in consequence of the possibility, (in contemplation of law), of the period for which the first interest is given, outlasting the term itself. And formerly it was held, that a term for years given to one for life, with remainder to others, vested absolutely in the first taker, notwithstanding the gift over, on the ground, that in consideration of law the life of a man is a greater estate than any lease for years. But it has now long been settled that possibilities, whether depending on one or more contingencies, may be legally limited in a term, at least by will. See Manning's case, 8 Co. 187; Howard v. Duke of Norfolk, 2 Swanst. 464; Doe dem. Shaw v. Steward, 1 Adol. & El. 300. And such possibilities have always been assignable in equity. 2 Freem. 238, 250. Donne v. Hart, 2 Russ. & My. 360. In Lampet's case (10 Co. 47, b.) it was decided, that a possibility of this description might also be extinguished by grant, or release, to him in possession. In that case, a testator being entitled to lands for a term of years, devised them to A. for life, and after his decease, to the testator's sister, Elizabeth, and made A. his executor. After the decease of the testator, Elizabeth married; and she and her husband granted, assigned, and yielded up the premises for all their term and interest therein to A., who was then in possession. But although the possibility in the term was held to be extinguished by the grant or release to A., yet it was adjudged, on the authority of Carter's case, 2 Brownl. 173, 175, that such possibility could not have been granted to a stranger during the lifetime of A. See also Shepherd's Touchstone, 239. In the case of Donne v. Hart, 2 Russ. & My. 360, however, the Master of the Rolls treated it as clear that a wife's contingent legal interest in a term may be sold by the husband. And indeed in modern practice, the decision in Carter's case has been very generally disregarded, owing to a reliance on the present disposition evinced by courts of law to afford every facility to the alienation of property, and to give effect to assurances in common use, and which would necessarily be hostile to any doctrine tending to make an interest which is recognised by law, and not being a chose in action, altogether inalienable. This reliance appears to have been well founded; since a late case (Doe dem. Shaw v. Steward, 1 Adol. & El. 300), may, perhaps, be considered as having established that every legal interest or possibility in a term is assignable at law. In that case, a testator bequeathed to S. a leasehold house during the term, in case he should so long live and continue to inhabit the said house; and

*The proprietor of land may grant the emblements, *or fruits and produce thereof;³ and not only such as are actually upon the land at the time of the grant, but such as may afterwards grow thereupon, or arise out of it;⁴ for, say the books, the land is mother and root of all fruits, and the proprietor of it is possessed of the present fruits *actually*, and of the future *potentially*.¹ So a parson may grant all the tithe wool that he shall have in such a year; but a man cannot grant all the wool, which shall grow upon his sheep, which he shall afterwards purchase; for he hath not the latter *actually*, nor *potentially*.²

*Advowsons are conveyed by grant at common law;³ and as they may be limited to uses, they may be also transferred by bargain and sale, covenant to stand seised, and lease and release. So a fine may be levied of an advowson:⁴ and if it be *appendant* to a manor, a recovery may be suffered of it upon a writ of entry *en le post*.⁵ But if the advowson be *in gross*, the recovery must be suffered upon a writ of right of advowson:⁶ or if it be suffered of the advowson, *together with a small quantity of land*, then it may be suffered upon a writ of entry *sur disseisin*.⁷

A corody *certain*,⁸ and services,⁹ are grantable in fee,

after his decease, or giving up possession of the house, or in case he should mortgage the same, then to M. the wife of S., to hold unto her for the remainder of the term, in case she should so long live therein and remain the widow of S., with remainder over. A commission of bankrupt issued against S., under which the assignees sold the property. S. then died; and his widow having brought ejectment for the premises, judgment was given for the defendants, who claimed under the vendee of the assignees. It will be observed, that the last-mentioned case, as well as Lampet's case, arose upon the assignment by a husband of his wife's possibility; but, of course, if the possibility of the wife be grantable by the husband, he may *à fortiori* grant one which belongs to him in his own right.]

¹ Perk. s. 57, 59.

² 2 Roll. Ab. 47, 48. So there may be a grant as well of trees then growing, as of trees which shall thereafter grow upon the soil. See Sir Francis Barrington's case, 8 Co. 136, b.; and 14 East, 338, 339, in Stanley v. White.

³ See Grantham v. Hawley, Hob. 132.

⁴ Ibid.

⁵ Litt. s. 617. Co. Litt. 332, a. A prebendary cannot charge his prebend before induction. Hare v. Buckley, Plowd. 526, 528. [See Grenfell v. The Dean and Canons of Windsor, 2 Beav. 544.]

⁶ 8 Co. Rep. 146, a.

⁶ Dormer's case, 5 Co. Rep. 40.

⁷ See 2 Cru. 167.

⁷ Baley v. University of Oxford, 2 Wils. 116.

⁸ Perk. sec. 103. 2 Roll. Ab. 45.

⁹ Shep. T. 238. Secus as to a corody uncertain, 2 Roll. 45.

or for life, or years; and so are seignories and franchises; such as views of frankpledge, and perquisites of courts; to have waifs, wrecks, estrays, treasure-trove, royal fish, forfeitures, and deodands; the conuzance of pleas or bailiwick, fair or market, a forest, chase, park, warren, or fishery, and the like.¹

A tenant in fee-simple may grant the title-deeds of his estate, and the grantees may either *keep or cancel [^{*39}] them: but not so as to a tenant in tail.²

On the other hand, there are several kinds of incorporeal property, which the policy of the law does not permit to be the subjects of grant or transfer. Thus, offices of trust and confidence are not grantable; unless in some special cases, which they are expressly granted to a man and *his assigns*, or to him and *his heirs*.³ So an annuity *pro concilio in posterum impendendo* cannot be transferred, unless the original grant thereof expressly authorise an assignment:⁴ and it has been lately determined, that the pay of an officer in the army is not assignable.⁵

[^{*40}] Indeed in no case will the law permit the transfer *of *choses in action*.⁶ Courts of equity, however, have in most instances supported assignments of them. A bond, the benefit of a decree or judgment,⁷ a seaman's wages,⁸ and the like *choses in action*, may be transferred in equity; such equitable transfer being con-

¹ Ibid. 239.

² Shep. T. 241, 242. Co. Litt. 232, b.

³ Perk. sec. 99, 100. Shep. 239, 241. 2 Atk. 14, 332. See Priddy v. Rose, 3 Mer. 86. A pension for past services may be alienated; but a pension for supporting the grantee in the performance of future duties, is inalienable. Davis v. Duke of Marlborough, Swanst. 74, and the cases there cited.

⁴ Perk. s. 101. 7 Co. 28, c. See Har. Co. Litt. 144, b. note 1.

⁵ Flarty v. Odlum, 3 Term. Rep. 681. Lidderdale v. Montrose, 3 Term. Rep. 248. [The retiring pension of a military officer of the East India Company does not, upon his bankruptcy, pass to his assignees. Gibson v. East India Company, 5 Bing. N. C. 262. And for the same reason, viz., upon principles of public policy, a compensation granted to a public civil officer, on the reduction of offices in his department, under the 4 & 5 Will. 4, c. 24, is not assignable by him. Wells v. Foster, 8 Mee. & Wels. 149. See also Cooper v. Reilly, 1 Russ. & My. 560; Grenfell v. The Dean and Canons of Windsor, 2 Beav. 544; Tunstall v. Boothby, 10 Sim. 542.]

⁶ Co. Litt. 214, a. See 2 Black. Com. 442. [Blackstone adds, "And therefore, when in common acceptation, a debt or bond is said to be assigned over, it must still be sued" (i. e. at law) "in the original creditor's name; the person to whom it is transferred being rather an attorney than an assignee."]

⁷ 3 P. W. 199, 200.

⁸ Crouch v. Martin, 2 Vern. 595. [Prize money, Alexander v. The Duke of Wellington, 2 Russ. & My. 35.]

sidered in the nature of an agreement, of which the Court of Chancery directs the performance.

(2.) Incorporeal property arising from, or consisting of rights to, land, and of the grantable quality before described, may be divided, as Mr. Fearne has observed, into two general classes : "The first, comprising such real hereditaments as consist of rights to future enjoyment of lands divided from the right of present possession, as *remainders* and *reversions*, together with such mixed hereditaments as consist in things issuing out of lands, or to be rendered, paid, or done, by the tenants or owners of lands in respect to the tenure thereof. The other class, extending to all the residue of incorporeal hereditaments, namely, to those mixed hereditaments which, though they relate to lands, or some benefit thereout, or have a local relation, yet are distinct from the ownership *or right of enjoyment of the lands [*41] themselves, or of anything to be paid, rendered, or done by the tenants or owners of land in respect of the tenure thereof."

A deed was necessary to the transfer of every kind of *incorporeal* property ; and as to the hereditaments falling within the latter of the above classes, they passed by the mere delivery and execution of the deed. But to the conveyance of those hereditaments, which are comprised in the first branch of the above division, the additional ceremony of *attornment* was necessary ; which was nothing more than the consent of the tenant of the land to the disposition or grant intended to be made. Attornment in cases of this kind was as necessary as livery of seisin in the conveyance of corporeal estates.¹

It is to be observed, that a use might have been raised upon a bargain and sale for a pecuniary consideration, and upon a covenant to stand seised in consideration of

¹ See Fearne's Posth. Works, 12.

It is proper here to observe, that if a man had leased his land *at will*, and had afterwards granted the land to another, the land would not have passed by the attornment of the tenant at will, because the grantor had not a reversion. 1 Roll. Ab. 292, a. pl. 9. [But see the case of Doe dem. Were v. Cole, 7 Barn. & Cress. 243, in which it was held, that the possession of a tenant from year to year is sufficient to support a grant of the reversion ; and that wherever the party intending to convey cannot give immediate possession, the lands lie in grant and not in livery.]

[*42] blood or marriage; and by the *mere operation of the Statute of Uses, the legal estate was transferred to the bargainee in the one instance, and to the covenantee in the other. No ceremony was made necessary by that statute to either of those conveyances: and therefore the solemnities of livery of seisin and attornment, were, in fact, totally superseded by it; for as the most trifling pecuniary consideration could raise a use for the benefit of the bargainee, it was no difficult matter to contrive, that every conveyance, not operating as a covenant to stand seised, should fall within the description of a bargain and sale. To correct this inconvenience occasioned by the Statute of uses, so far as it related to *bargains and sales*, the Statute of Irolments was made;² which enacted, that no hereditaments should pass from one man to another, whereby any estate of freehold or inheritance should be made or take effect in any person, or any use thereof to be made, *by reason only of any bargain and sale thereof*, except such bargain and sale be inrolled within six months next after the date thereof.

From the evident import of the words of this statute, it seems clear, that if there had been a conveyance of *corporeal* hereditaments by livery of seisin, or a grant of *incorporeal* hereditaments falling within the first branch of the above division by deed and attornment, or if [*43] coming *within the second branch of it, by deed only; the hereditaments, comprised in such conveyance or grant, could not have been said to pass *by reason only of a bargain and sale thereof*;³ but on the contrary, by reason of the livery in the one case, and of the deed and attornment, or deed only, in the other: and, that if there had been a grant of incorporeal hereditaments of the first description for a pecuniary consideration *without attornment*, such grant would have been considered as a bargain and sale within the statute, and would have required inrolment as such.

Thus the matter stood upon the principles of the common law, and upon the construction of the Statute of

² 27 Hen. 8, c. 16.

³ See 2 Inst. 671. 1 Leon. 6.

Inrolments. But some doubts have arisen upon the statute of 4 Ann. c. 16, s. 9 ; by which it was enacted, "That grants and conveyances by fine or otherwise of any manors or rents, or of the reversion or remainder of any messuages or lands, shall be good and effectual to all intents and purposes, without any attornment of the tenants of any such manors, or of the land out of which such rent shall be issuing, or of the particular tenants, upon whose particular estates any such reversions or remainders shall and may be expectant or depending, as if their attornment had been had and made."

It is manifest, that if this act be allowed to *operate in the full extent of the above words, it [*44] will virtually repeal the Statute of Inrolments, so far as it related to hereditaments which required the ceremony of attornment to transfer them.

As I have before observed, the Statute of Inrolments extended only to conveyances operating under the Statute of Uses by way of *bargain and sale*, for the purpose of introducing the ceremony of inrolment in the place of livery of seisin, and attornment, in cases where those solemnities were superseded by the operation of the latter statute. The act of inrolments was never meant to apply to those conveyances, which, operating under the principles of the common law, were complete without the assistance of, or any reference to, the doctrines and Statute of Uses. Therefore, when incorporeal property described in the second of the above classes was intended to be conveyed, the grant thereof was perfect at the common law upon the execution of the deed only ; and when that in the first of those classes was intended to be granted, the additional ceremony of attornment was necessary to the transfer. But in both cases *inrolment* was unnecessary. When indeed the ceremony of attornment was omitted in the latter case, the grant, if made for a pecuniary consideration was considered as a *bargain and sale* within the statute. Why ? Because it was otherwise incomplete : it could otherwise have no operation at all.

*Then the Statute of Anne was enacted, which [*45] expressly directs, that all grants of rent, rever-

sions, and remainders, shall be perfect *without attornment*. Now if we are to form a construction upon this statute from the general import of the words, the effect produced by it would be, that all incorporeal hereditaments, in respect to the transfer of them, are placed upon the same footing: that they will all pass without attornment by deed only; and consequently, that grants of hereditaments, described in the first branch of the above division, being now perfect without attornment, and without the aid of, or any reference to, the Statute of Uses, will no more require enrolment under the statute, when made for a consideration in money, than grants of hereditaments falling within the second of the above classes.

But Mr. Fearne has contended, that the Statute of Enrolments stands entirely unaffected by the Statute of Anne respecting attornments; because it would be contradictory to all the rules, which hold in the construction of statutes, to extend such general indefinite words, as the words, *or otherwise*, in the Statute of Anne, to the repeal of a preceding statute, unnoticed in the subsequent one.⁴

It appears to me, however, that the words of the Statute of Anne express the meaning of the legislature very clearly and distinctly: and if the *manifest intention of the statute cannot be effected without a partial repeal of a preceding one, I can see no reason why the rule of law, which says, that *leges posteriores abrogant priores*, should not take place. The two statutes appear perfectly repugnant to each other, so far as they relate to incorporeal hereditaments, which require attornment to pass them: and I can see nothing contradictory to the rules, usually adopted in the construction of statutes, in considering the former statute virtually repealed by the latter to the extent of such repugnancy.

But an evident inconsistency would result from the construction contended for by Mr. Fearne. Suppose a voluntary grant of hereditaments comprised in the first of the above classes, without either a good consideration to support it as a covenant to stand seised, or a pecuniary

⁴ See Fearne's Posth. Works, 32, 33.

one to establish it as a bargain and sale ; as this grant does not interfere with the Statute of Inrolments, there can be no doubt but that it would be good by the Statute of Anne *without attornment* ; and yet, according to Mr. Fearne's construction, that statute would be altogether inapplicable to another grant of *the same hereditaments, and under the same circumstances*, excepting only in the trivial, and perhaps accidental one of having the consideration of a shilling, or a penny, so as to make it a bargain and sale within the Statute of Inrolments.⁶

*(3.) The word *grant*, is the most proper for [*47] the transfer of incorporeal hereditaments. But it is not absolutely necessary in grants, strictly operating as such at common law by the mere delivery of the deed. Therefore it has been determined, that words of covenant,⁷ or an instrument in the shape of an obligation,⁸ may amount to a grant of a way, or a rent-charge.

The word *grant*, is essentially requisite in those cases only, where the conveyance, by which the *incorporeal* property is intended to pass, is *exclusively* applicable to the transfer of *corporeal* hereditaments; or being applicable to the transfer both of corporeal and incorporeal property, some ceremony, necessary to the completion of it, is omitted. Thus, no incorporeal property can pass by a feoffment and livery, unless the word *grant* be used;⁹ and when a conveyance is intended to operate as a release, surrender, or confirmation, and such release, surrender or confirmation, is defective, by reason that the releasee, surrenderee, or confirmee, has no estate to support the conveyance as a release, &c., or upon any other account; then such defective conveyance cannot operate as *a grant of the *incorporeal* hereditaments intended to pass, unless the operative word, *grant*, be therein particularly applied to the transfer.¹⁰ So

⁶ [See *Smith v. Frederick*, 1 Russ. 174, 196, 210.]

⁷ *Mountjoy's case*, 3 Lev. 305. 4 Leon. 147. 2 Ves. sen. 9.

⁸ *Co. Litt. 147, a.* 2 Roll. Ab. 424, or the words, "limit and appoint." *Shove v. Pincke*, 5 Term Rep. 124, 310.

⁹ See the opinion in *1 Bridg. Con. 323.* 2 Roll. Ab. 56, pl. 2. It should seem from the books, that a feoffment of a *reversion* or *remainder*, with the subsequent *attornment* of the tenant, would have amounted to a *grant* before the Statute of Anne. See 2 Roll. Ab. 56, pl. 13. 2 Bac. Ab. 491.

¹⁰ See *Litt. a. 541, 542.* *Co. Litt. 301, b.* *Cowp. 600.* But see *Shove v. Pincke*, cited above.

[*50] it has been *determined,¹ that where a *reversion* was intended to be conveyed by *bargain and sale*,

[The liberality which the courts have, in later times, evinced in construing deeds so as to effect the intention of the parties, renders it probable that in no case would the word "grant" be deemed essential. Indeed, the test which is mentioned in the text seems to be illusory, unless the intention as to the *modus operandi* of the deed is to be gathered, not from the entire contents of the instrument and the nature of the transaction, but from the use of some particular expressions, a rule which is certainly not deducible even from the more ancient authorities on this subject. See 2 Lev. 9; 3 Lev. 370; 1 Mod. 175; and see also 1 Russ. 210. In the case of Adams v. Steer, Cro. Jac. 210, it was resolved that a reversion will pass by the words "alien, bargain, and sell," though the deed be not inrolled; and in Roll. Ab. 788, (R. 568,) it is stated, that if a woman, in consideration of an intended marriage, by deed inrolled, "gives, grants, and confirms" to the use of the intended husband and his heirs, with clause of warranty, but no livery of seisin, and afterwards the marriage takes place, the use arises to the husband by force of the deed. In this latter case, although the operative words of conveyance were applicable exclusively to a feoffment, or grant, the intention of the parties that the deed should operate in another way, prevailed; and that intention was collected, not from the use of particular operative words, but from the omission of one ceremony, (the livery of seisin,) and the adoption of another, (inrollment.) It appears, therefore, that the use of the word "give," or "enfeoff" alone, or of the words "bargain and sell" alone, is not to be held conclusive as to the intention of the parties that the instrument shall operate as a feoffment, or as a bargain and sale, but that the omission of the ceremony requisite for perfecting the assurance as a feoffment in the one case, or as a bargain and sale in the other, would serve to indicate a contrary intention. It is true that, in Adams v. Steer, the word "alien" was relied on; and it was said to have been held in another case there cited, that by the words "bargain and sell" only with attornment, a reversion passeth not. But this earlier case appears to be inconsistent with, and may, perhaps, be considered as over-ruled by, that of Shove v. Pincke: for the words "limit and appoint" have a peculiar technical meaning, as well as the words "bargain and sell;" and the reason for holding that a grant may be made by expressions, the province of which is merely to limit a use, must equally apply to expressions whose property it is to raise or create a use. In fact, in the making of all assurances there are two intentions; the first, which is the chief and primary one, as to the nature of the interest to be passed or created: the other, which is merely secondary, as to the form of the instrument by which the object of the parties is to be effected. 3 Lev. 372. 1 P. W. 163. Hob. 277. Shep. Touch. 82, 83. 2 Ball & Beat. 46. And the principal to be extracted from the cases appears to be this, that where the primary object is apparent from the assurance itself, or the nature of the transaction, it must be assumed that the secondary intent, being one merely relating to form, is such as to effect that primary object. If this view of the authorities be correct, it would follow, that the alleged distinction between an assurance intended to operate as a grant, and one intended to operate in some other way than a grant, is (as has been already observed) an un-substantial one; since it is admitted that, in the former case, the omission of the word "grant" is immaterial; and it appears that the law infers or supplies the intention for a sufficient operation of the deed, where the only apparent defect is the mere substitution of one technical expression (however inappropriate,) for another; and where that defect, if held to be material, would prevent the deed from having any operation at all. See 1 Atk. 8, where it is said, that wherever a court of law or equity find that the general and substantial intent of the parties was that the estate should pass, they will construe deeds in support of that intention, different from the formal nature of those deeds themselves.]

In the case of Haggerston v. Hanbury, 5 Barn. & Cress. 101, it was decided, that a deed which contained the words "grant, bargain and sell," and which

¹ See next page.

by the words, *bargain and sell* only (the conveyance being void as a bargain and sale for want of enrolment), it should not pass by way of grant at common law with attorney.³

As incorporeal hereditaments may be surrendered,⁴ released,⁵ and limited to uses,⁶ they may consequently be conveyed by surrender, lease and release, and bargain and sale, without the word *grant*;⁷ because there are other particular terms appropriated to each of those conveyances.

*(4.) A grant at common law passes such an [*51] estate only in the property conveyed, as the grantor may lawfully transfer. It consequently does not work a *discontinuance*, when made by tenant in tail of an advowson, common, remainder, or any other inheritance lying in grant.⁸

had been enrolled, (such enrolment evincing the election of the parties to treat, the assurance as a bargain and sale, Roll. Ab. 786, 787,) operated, nevertheless as a grant, because otherwise the legal estate would not have been in the parties in whom it was evidently intended to be vested. The decision in this case, however, as well as in that of Doe dem. Wynne v. Griffith, 5 Barn. & Cress. 923, in neither of which are the reasons for the judgment given, may certainly be referred to principles of construction, which are quite beside the intention of the parties,—as, for instance, that where a deed may operate in two ways, the way by which the estate was first executed, shall prevail (Roll. Ab. 787;) or the rule that where a deed may operate to pass land, either by the common law or the Statute of Uses, it shall be held to operate at common law. It is clear, however, that no rule of law of this nature would be allowed to prevail *against* the evident intention of the parties.

A reservation, or exception, may operate as a grant. Wickham v. Hawker, 7 Mee. & Wels. 63.]

¹ Cro. Jac. 210. Moor, 34, pl. 113.

² But see 3 Leon. 16. "If he in reversion on a lease for years, grants his reversion to his lessee for years by words of *dedi, concessi, feoffavi*, and a letter of attorney is made to make livery of seisin, the donee cannot take by the livery, for that the lessee hath the reversion presently."

³ Co. Litt. 338, a.

⁴ Shep. T., 321, 322.

⁵ See ante, vol. i. 105, and post, tit. Bargain and Sale, sec. 6.

⁶ See as to a lease and release, Mr. Booth's opinion in vol. ii. of Cases and Opinions, 144.

⁷ Litt. sec. 616, 617. Co. Litt. 332, a. [The term "discontinuance" was used to distinguish those cases in which the possession might be recovered by entry from those in which it could be recovered by action only. It is defined by Lord Coke to be an alienation made or suffered by tenant in tail, or by any that is seized in *uter droit*, (as a husband seized in right of his wife, or a person in right of his church,) whereby the issue in tail, or the heir or successor, or those in reversion or remainder, are driven to their action, and cannot enter. (Co. Litt. 325, a.) A discontinuance also took place where a disseisor died seized, provided (since the stat. 32 Hen. 8, c. 33,) he had had peaceable possession for five years next after the disseisin. But things lying in *grant* could not either be divested or restored by entry; and, therefore, to such things the distinction between right of entry and right of action could not be applicable. Now,

***BARGAIN AND SALE.**

(1.) THE conveyance by bargain and sale was introduced before the Statute of Uses, and originated from an equitable construction of the Court of Chancery. A bargain was made, or a contract entered into, for the sale of an estate; the purchase-money was paid, but there was either no conveyance at all of the legal interest, or a conveyance defective at law by reason of the omission of livery of seisin, or attornment: that court properly thought, that the estate ought in conscience to belong to the person who paid the money, and therefore considered the bargainer or contractor as a *trustee* for him.

by stat. 3 & 4 Will. 4, c. 27, s. 39, no discontinuance will toll or defeat any right of entry, so that in effect discontinuances are altogether abolished.

It may be here observed, that under the last-mentioned act (sec. 39,) no warranty will now defeat any right of entry or action; (see also stat. 3 & 4 Will. 4, c. 74, s. 14, as to warranties by tenant in tail;) and by sec. 36, of the same act, 3 & 3 Will. 4, c. 27, all those real actions in which the writ of *warrantia chartarum*, or a voucher under a warranty, might be resorted to, as well as the writ of *warrantia chartarum* itself, are abolished. But perhaps even this virtual extinction of warranties (strictly so called) so far as estates of freehold are concerned, may not entirely dissipate the fears of those who previously excepted to the use, by parties having no beneficial interest to convey, of that much misconstrued and persecuted word, "grant," from a groundless apprehension that a warranty was implied in it. On this point, see Butlers note (1) to Co. Litt. 384, a. where it is satisfactorily shown that in conveyances in fee-simple, warranty is not implied by the word "grant," or any other word except the word "give," and that then it holds only during the life of the grantor; and that in gifts tail, and in leases for life by the word "give," warranty is a necessary legal consequence of the tenure between the donor, and the donee, or lessee.

Warranty, in the strict technical sense of the term, is confined to lands or tenements of an estate of freehold or inheritance, and does not extend to chattels, real or personal. But where a warranty (so called) is annexed to a chattel, the party shall not touch, but have his action of covenant if he hath a deed. Co. Litt. 101, b. In this sense, the word "grant" is said to imply a warranty in the creation or assignment of a term, amounting, in fact, to a covenant for quiet enjoyment: 2 Bac. Abr. 65. An implied warranty of this nature will be qualified by express covenant, (Stannard v. Forbes, 6 Adol. & El. 572;) so that even in the case of the grant or assignment of a term, by trustees, there is no objection to the use of the word grant, if they enter into the usual covenant that they have done no act to incumber.

If a man conveys in fee with warranty, and after the land is evicted by elder title for certain years, the grantee may have *action of covenant*, though the warranty be annexed to a freehold: for the same words make a covenant if a chattel be evicted, and a warranty if a freehold be demanded. Vin. Abr. Cov. C.

Under the acts 6 Ann. c. 35, and 8 Geo. 2, c. 6, the words "grant, bargain and sell" in bargains and sales of hereditaments in Yorkshire enrolled according to those acts, have the effect of the usual covenants for title entered into by a vendor.]

An equitable interest in land, thus raised and conveyed in the first instance by the payment of money upon a mere contract, or upon a conveyance inoperative at law, became, in process of time, transferrable by a formal conveyance under the name of a bargain and sale.

The bargainee, entitled to the use by virtue of this equitable conveyance, became immediately *seised of the possession by the Statute of Uses; and the [*54] operation of that statute, as I have before observed, tended, in effect, to supersede altogether the solemnities of livery of seisin and attornment: for whenever a pecuniary consideration was introduced into a conveyance, unaccompanied by livery of seisin, or attornment, such conveyance immediately became a bargain and sale; and the possession was thereupon transferred to the bargainee without any other ceremony than the mere delivery of the deed.⁸ Therefore, to restore in some measure the policy of the common law, in adding notoriety to the transfer of property, the statute 27 Hen. 8, c. 16, directs, that every conveyance by *bargain and sale* shall be inrolled within six months⁹ after the date thereof.

⁸ [At the time of making the Statute of Uses, a mere parol contract for the sale of lands, accompanied by the payment of the purchase-money, was a sufficient bargain and sale constituting the vendor, or bargainer, a trustee for the purchaser; and thus, by virtue of such a contract, and the operation of the statute, a legal conveyance might have been made without any writing, or any ceremony whatever. Such a result was in direct contravention of the policy of the Statute of Uses itself, (see the preamble;) and the statute quoted in the next note was passed immediately afterwards.]

⁹ 27 Hen. 8, c. 16, "Be it enacted by the authority of this present parliament, that from the last day of July, which will be in the year of our Lord 1536, no manors, lands, tenements, or other hereditaments, shall pass, alter or change from one to another, whereby any estate of inheritance or freehold shall be made or take effect in any person or persons: or any use thereof to be made, by reason only of any bargain and sale thereof, except the same bargain and sale be made by writing indented, sealed, and inrolled in one of the king's courts of record at Westminster, or else within the same county or counties where the same manors, lands, or tenements so bargained and sold, lie or be, before the *custos rotulorum*, and two justices of the peace, and the clerk of the peace of the same county or counties, or two of them at the least, whereof the clerk of the peace to be one; and the same inrollment to be had and made within six months next after the date of the same writings indented; the same *custos rotulorum*, or justices of the peace and clerk, taking for the inrollment of every such writing indented before them, where the land comprised in the same writing exceeds not the yearly value of forty shillings, two shillings; that is to say, twelve pence to the justices, and twelve pence to the clerk; and for the inrollment of every such writing indented before them, wherein the land comprised exceeds the sum of ten pounds in the yearly value, five shillings; that is to say,

[*55] (2.) The possession, or rather *legal estate, thus transferred by the operation of the Statute of Uses, is equivalent, in most respects, to a possession or legal interest acquired by an actual entry, or attorneyment, under a conveyance operating at *common law. Therefore, if a bargain and sale be made for years of land in the possession of the bargainer, such estate for years is capable of receiving a release of the reversion before an actual entry by the bargainee;¹ but it seems doubtful, whether the bargainee can maintain an action of *trespass* before an actual entry.² So, a bargainee of a reversion may avow for rent, or bring an action for waste without attornment;³ but it seems, that he must give notice of the bargain and sale, before he can take advantage of a condition for non-payment of rent.⁴ It is said, that a bargainee can never vouch by force of any warranty annexed to the estate of the land, because he is *in in the post*;⁵ but that he may rebut by virtue of it.⁶

(3.) A pecuniary consideration is necessary to raise a use upon this conveyance;⁷ therefore the consideration

two shillings and sixpence to the said justices, and two shillings and sixpence to the said clerk, for the inrollment of the same; and that the clerk of the peace for the time being, within every such county, shall sufficiently inroll and ingross in parchment the same deeds and writings, indented as is aforesaid; and the rolls thereof at the end of every year shall deliver unto the *custos rotulorum*, for the time being, there to remain in the custody of the said *custos rotulorum* for the time being, amongst other records of every of the same counties, where any such inrollment shall be so made; to the intent that every party that hath to do therewith, may resort and see the effect and tenor of every such writing so inrolled.

"Provided always, that this act, nor any thing therein contained, extend to any manor, lands, tenements, or hereditaments, lying or being within any city, borough, or town corporate within this realm, wherein the mayors, recorders, chamberlains, bailiffs, or other officer or officers have authority or have lawfully used to inroll any evidences, deeds, or other writings within their precincts or limits; any thing in this act contained to the contrary notwithstanding." See the Irish Act of 10 Car. 2, c. 1, s. 18.

¹ See *Lutwich v. Mitton*, Cro. Jac. 604.

² 1 Vent. 361. Cro. Jac. 604. [2 Mod. 251.]

³ 6 Co. 68, a.

⁴ Cro. Jac. 146, 478. 5 Co. 113. See *Ow. 69.*

⁵ 1 Co. 125, a. *Gilb. 102. Sed contra, Shep. 222.*

⁶ 2 Roll. Ab. 786, 787, pl. 1. *Vide supra*, vol. i. 121, 122. [By stat. 3 & 4 Will. 4, c. 27, s. 39, no warranty made after the 31st day of December, 1833, shall defeat any right of entry or action for the recovery of land.]

⁷ See 1 Co. 176, a. Note, in *Barker v. Keat*, 2 Mod. 252, it was said, that the reservation of a *peppercorn* would raise a use in a bargain and sale for a year, in support of a *common recovery*. See 1 Freem. 249, and generally upon this head, 22 Vin. 205, and the cases collected under Division O.

of a long acquaintance, or of friendship;⁸ *or of natural love and affection,⁹ or of marriage,¹ or that [*57] the bargainer is bound in a recognizance for the bargainer,² cannot create a use upon a bargain and sale.

But courts of equity, which originally created a use from motives of conscience, upon payment of a *valuable* consideration, afterwards permitted it to be raised and transferred upon an actual conveyance by bargain and sale for any pecuniary consideration of the most trifling amount; upon payment of five shillings, or upon the reservation of a rent of twelve pence.³

The actual sum paid by the bargainer need not be stated, if the conveyance be expressed to be made in consideration of a *certain*⁴ or *competent*⁵ sum; nor is there a necessity that the money should be paid upon the execution of the bargain and sale: for such bargain and sale may be made either conditionally, that a sum of money shall be paid upon a subsequent day,⁶ or absolutely in consideration of a future payment,⁷ or of a sum paid previously to the execution of it.⁸ But if a [*58] *bargain and sale be made for *divers good causes* and *considerations*, no use can be raised upon such general consideration; and yet the conveyance may be rendered valid by an averment, that money was actually paid.⁹ Indeed it was formerly determined, that where a particular consideration was expressed in a deed, an averment of another might be made;¹ but it is now said, that if in a deed the consideration of money be expressed, and afterwards the parties attempt to aver the consideration of blood, such averment cannot be made; for that it would be of mischievous consequences, and liable to the danger of perjury, which the *Statute of Frauds* intended to prevent, to suffer parol evidence to prove, that the consideration of blood and kindred was intended, contrary to that of money, particularly expressed in the deed.²

⁸ 2 Roll. Ab. 783.

⁹ Crossing v. Scudamore, 1 Vent. 137.

¹ 2 Roll. Ab. 787, 788. 10 Co. 34, a.

² Moor, 570, in Fisher v. Smith.

⁷ Dy. 337, a. in pl. 34.

⁹ See 1 Co. 176, a.

⁸ Clarkson v. Hanway, 2 P. W. 204. [1 Burn & Cress. 704. 3 Bing. 328.]

⁹ Osborn v. Churchman, Cro. Jac. 127.

¹ Ward v. Lambert. Cro. El. 394.

⁴ 2 Roll. Ab. 786.

⁶ 1 Leon. 6.

⁸ 3 Keb. 201.

¹ Co. 176, a. 2 Co. 76, a. b.

It appears from Roll's Abridgment,³ that if a man, in consideration of a certain sum paid by B., bargain and sell his lands to A. for life, remainder to C. in fee, this is good; for though A. and C. did not pay the consideration, yet it is evident that it was paid upon their account; or that if the bargain and sale had been made to B. for life, with many remainders over, the consideration might well extend to those in remainder. Roll, indeed, puts [^{*59}] the case of a covenant to stand **seised for money*; but such covenant would at this day operate as a bargain and sale.

(4.) The words of transfer applicable to this conveyance are *bargain and sell*; but they are by no means necessary, nor material to its operation. If a man for a pecuniary consideration, by deed indented, *covenant to stand seised* to the use of another person,⁴ or *give and enfeoff*,⁵ or *alien, grant*, and *demise* to him;⁶ such deed, if properly inrolled, will operate as a bargain and sale. In Fox's case,⁷ it was said, that if it should appear from any clause in a deed, that it was the intention of the parties to pass land by a common law conveyance, there no use should be raised. But it has been expressly determined to the contrary. A. by deed indented, conveyed in the following words: "I, the said A., have *given, granted, and confirmed* for a certain piece of money, &c.;" the *habendum* was to the feoffee, with warranty against A. and his heirs; and there was a *letter of attorney to make livery and seisin*. The deed was *inrolled* within one month after the making of it; and the attorney, after four months from the delivery, made livery of seisin. It was the opinion of the whole court, that the conveyance should operate as a *bargain and sale*.⁸

[*60] *If a term of years be created, in consideration of a sum of money, by the words *demise, grant, bargain, and sell*,⁹ or by the words *demise and grant*¹⁰ only,

³ 2 Roll. Ab. 784, pl. 6, 7. Winch. 61.

⁴ 8 Co. 94, a. ⁷ Co. 40, in Bedell's case, 1 Vent. 138.

⁵ 3 Leon. 16.

⁶ 8 Co. 94, a. See Taylor v. Vale, Cro. El. 166.

⁷ 8 Co. 94.

⁸ 3 Leon. 16, a. c. 39. Vide ante, 47, 48. [See Haggerston v. Hanbury, 5 Barn. & Cress. 101. Wynne v. Griffith, ib. 923. Miller v. Green, 8 Bing. 92. 1 Atk. 8.]

⁹ Heyward's case, 2 Co. 35. [8 Bing. 92.]

¹⁰ See 1 Mod. 262, 263. 2 Mod. 252. Barker v. Keat.

the grantee is at liberty to accept of the conveyance as a demise at common law, or as a bargain and sale. But it is said, that when a conveyance may take effect either at the common law, or under the Statute of Uses, it shall operate at the common law, unless the intention of the parties appear to the contrary; therefore, if it be intended, that a term of years should be created by bargain and sale, the words *bargain and sell* only should be applied to the transfer, for the purpose of avoiding any uncertainty as to the operation of the deed.

(5.) There must be a use, and a *seisin* to serve it, in every bargain and sale; and it must follow, that a person, incapable of standing seised to a use, cannot transfer lands by this conveyance.³ But an exception to this rule appears to have been attempted in favour of a corporation, in the case of *Holland v. Boins*.⁴ In that case it was said, that though a corporation could not stand seised to a use, yet it might *charge* its own possessions with a use; a distinction certainly incompatible with a fundamental rule in the construction of uses; [*61] that the use is not annexed to, nor chargeable upon, the land. It is remarkable, that this very notion of *charging* the land with a use was considered in the celebrated case of *Chudleigh*; and it was there mentioned as an *aburdity*,⁵ because, if adopted, it would have the effect of enabling an alien, the King, a *corporation*, the lord by escheat, &c., to stand seised to uses. However, to prevent any serious consequences, which may arise from the determination in the case of Holland and Boins, it is usual in practice to make a corporation convey either by feoffment with livery, or by lease and release, with an actual entry by the lessee for a year.

(6.) All corporeal hereditaments, of which the bargainer has a *seisin*, and all incorporeal hereditaments in *actual existence*, may be conveyed by bargain and sale; because they may be limited to uses.⁶ So a trust declared upon a legal estate, and an equity of redemption, may be transferred by this conveyance.⁷

³ See Gilb. *Uses*, 285. Cro. Jac. 50.

⁴ 2 Leon. 121. 3 Leon. 175. [See ante, p. 28.]

⁴ See 1 Co. 127, a.

⁵ See ante, vol. i. 105; and ante, tit. *Grants*, sec. (1.)

⁶ See Oldin *v. Samborne*, 2 Atk. 15. It has been holden that the word *seisin*

A man seised in fee may convey by bargain and sale for a term of years, but no chattel interest already [*62] created can be transferred by "bargain and sale;" because the statute requires a seisin to serve uses, and the owner of a chattel interest can only have a possession.⁸

(7.) As no use can be limited to arise of a use, it follows, from the above description of this conveyance, that a use cannot be limited upon the legal estate of the bargainee, so as to be executed by the statute.⁹ Neither can there be a *scintilla juris* or possibility of seisin remaining in the *bargainor*, after the bargain and sale, to serve a use limited upon a future event; because the pecuniary consideration paid, or supposed to be paid, by or on account of the bargainee, and which constitutes the foundation of the bargain and sale, appropriates the use exclusively for his benefit. The limitation of the use to the bargainee is a consequence arising from the payment of the money;¹ and beyond that limitation the original consideration and contract do not extend. Therefore if there be a bargain and sale for the life of the bargainee, with a power for him to make leases, a lease made under that power cannot operate as an appointment of the use to the lessee.²

[*63] *A. conveyed by bargain and sale to B. and his heirs, upon condition, that if A. paid a certain sum to B., he might re-enter, and thereupon stand seised to the use of himself and his heirs, until he attempted to alien without the consent of B., and then to the use of B. and his heirs; and levied a fine to those uses. A. paid the money, entered, and conveyed the land without B.'s consent. It was said, that no use could arise to B. upon the alienation; because the *bargainor*, entering for a condition broken, was in of his old use, and could stand seised to no other.³

is applicable to a trust estate. See *Shrapnell v. Vernon*, 2 Bro. C. O. 268, 272.

⁷ *Gib. Uses*, 286.

⁸ Poph. 76. See *ante*, vol. i. 275; and *ante*, tit. *Feoff.* sec. (9.) 3.

⁹ See *Tyrrell's case*, Dy. 155, a. 1 And. 37. 1 Leon. 148.

¹ [Note, that the bargainee need not be the party paying the money. *Ante*, p. 58.]

² Poph. 81. See also 2 *Roll.* 260. *Cro. J.* 181.

³ *Holloway v. Pollard, Moor*, 781.

But it should seem that a covenant may be contained in a bargain and sale, on the part of the bargainer, which will raise a use out of his legal estate upon a future event. Thus if a bargainer covenant that upon payment of a sum to him he will stand seised to the use of the bargainer and his heirs; the payment of the money will, it should seem, raise the use.⁴ But in this case, the original bargain and sale, and the covenant contained in it, must be considered as two conveyances,⁵ founded upon distinct pecuniary considerations; and, consequently, I conceive, there should be two inrolments.⁶

(8.) A bargain and sale is one of those harmless conveyances which operate merely upon what [*64] the grantor may lawfully convey. It therefore cannot work a discontinuance,⁷ create a forfeiture,⁸ nor destroy contingent remainders dependent upon a particular estate.⁹ But it is settled, that if a tenant in tail convey in fee by bargain and sale, the bargainer has a base fee determinable upon the death of tenant in tail by the entry of the issue.¹

(9.) The Statute of Inrolments requires that the bargain and sale should be by deed indented,² and that the inrolment of the deed should be in *parchment*,³ within six *lunar*⁴ months from the *date,⁵ if the deed [*65] have a date; but if not, then from the *delivery*.⁶

⁴ See Moor, 35, pl. 115, Dalis, 38.

⁵ Vide 2 Roll. Ab. 786, (M.)

⁶ [The Statute of Inrolments requires the bargain and sale to be by writing, indented, sealed, and inrolled; and it may fairly be contended that wherever one writing is sufficient, one inrolment must be sufficient also, the object of the inrolment being merely to give notoriety to the instrument. It is generally admitted that where an inrolled deed may have divers operations under different statutes, a single inrolment is sufficient for supporting all those operations. Thus a deed inrolled may operate as a bargain and sale under the Statute of Inrolments, and likewise as a disentailing assurance under the act 3 & 4 Will. 4, c. 74. See sec. 41.]

⁷ Gilb. Uses, 297. Co. Litt. 332, b. [As to discontinuances, see 3 & 4 Will. 4, c. 27, s. 39.]

⁸ Gilb. Uses, 102. See Sir William Pelham's case, 4 Leon. 123.

⁹ Gilb. Uses, 140. Fearne, 322, 9th edit. Hard. 416.

¹ Seymour's case, 10 Co. 95. Machill v. Clark, 2 Salk. 619. See 1 Atk. 2. [Goodright v. Mead, 3 Bur. 1703. Doe v. Rivers, 7 T. R. 276. Doe v. Whichelo, 8 T. R. 211. Doe v. Ross, 7 Mee. & Wels. 102. Doe v. Woodroffe, 10 Mee. & Wels. 608.]

² See 3 Leon. 16, 17.

³ 2 Inst. 673. Dy. 218.

⁴ 2 Inst. 674. Shep. T. 223.

⁵ 2 Inst. 674. Shep. T. 223.

⁶ Ibid. Hob. 140. [An assurance by which any disposition of lands is ef-

The inrolment may be made either upon the day of the date,⁷ or upon the last day of the six months, reckoning the day of the date *exclusively*.⁸

(10.) The legal estate is vested in the bargainee by the Statute of Uses upon the execution of the deed; but the Statute of Inrolments obstructs the operation of the conveyance, until it be enrolled. The inrolment, how-
[*66] ever, has, for *most purposes, a relation to the delivery of the deed;⁹ and thereby avoids all mesne incumbrances¹ and conveyances² made by the *bargainor* between the delivery and inrolment. A bargainee before inrolment may be a good tenant to the *præcipe* for suffering a recovery;³ and if he die, his wife shall have dower, in case the deed be afterwards inrolled,⁴ but not so as to the wife of the *bargainor*.⁵ If there be two joint tenants, and one of them bargain and sell the estate in fee, and then the other die before the inrolment, only a

fected under 3 & 4 Will. 4, c. 74 (the act for the abolition of fines and recoveries, s. 41), being a bargain and sale, is, if inrolled in Chancery within the time prescribed by that act (i. e. within six *calendar* months after the execution), as good and valid as if it had been inrolled within the time prescribed by the Statute of Inrolments.] ⁶ 2 Inst. 674.

⁷ Thomas v. Popham, Dy. 218. [See Lester v. Garland, 15 Ves. 248. Pellew v. Inhabitants of Wonford, 9 Barn. & Cress. 134.

It is to be observed, that the Statute of Inrolments does not extend to hereditaments within any city, borough, or town corporate where deeds had lawfully used to be inrolled within their precincts or limits. There are also various statutes by which inrolments in particular districts of bargains and sales of hereditaments lying within those districts are made as effectual as if the same bargains and sales had been inrolled in a court of record at Westminster; as the act 5 Eliz. c. 26, relating to hereditaments lying within the counties of Lancaster and Chester, and the county of the bishopric of Durham respectively; and the acts 5 Ann. c. 18, 6 Ann. c. 35, and 8 Geo. 2, c. 6, relating respectively to hereditaments within the West Riding, the East Riding, and the North Riding of the county of York.]

⁸ 2 Inst. 674. But in Brook's Reading upon the Statute of Limitations, 48, it is said, "That a man sells his land by indenture after the statute, and before the inrolment the vendor is attainted of felony, committed after the bargain and before the inrolment; and after the deed is inrolled, within six months the lord enters for escheat, the vendee doth ouster him, and declares of a seisin by sixty years, the lord may re-enter and retain, notwithstanding the statute; because that the land is not vested in the vendee, until inrolment, and a matter of record shall not have relation beyond the teste, and mesne acts vested shall not be devested: and it seemeth that this Statute of Limitations doth not take away the right nor entry of none of his own proper seisin, but only his action, prescription, title, and claim, of the seisin of his ancestors and predecessors; and if the vendor die before inrolment, the lord shall have the ward."

¹ Mullery v. Jennings, 2 Inst. 674. See Flower v. Baldwin, Cro. Car. 217.

² Thomas v. Popham, Dy. 218. See Moor, 41. 4 Co. 71, a.

³ 2 Inst. 675. Owen, 70.

Cro. Car. 217. Cont. Shep. T. 226. Ow. 70, 150.

⁴ Shep. T. 227. Cro. Car. 569.

moiety shall pass to the bargainer, though the deed be afterwards inrolled;⁶ and though *the words of [*67] the bargain and sale comprise the whole estate.⁷ So, if a bargain and sale be made of a manor with an advowson appendant, and the church become void before the inrolment, the bargainer shall have the presentment.⁸

The bargainer of a reversion shall have the rent incurred between the delivery and inrolment of the deed:⁹ but if the rent be paid by the tenant to the bargainer, the payment is lawful, and the bargainer is not compellable at law to account for it.¹⁰ So, if a bargainer grant a rent before inrolment, it is a good grant, if the deed be afterwards inrolled.¹¹

A bargainer may receive a release from a stranger before inrolment;¹² but it is said, that if a bargain and sale be made to A. and B. and their heirs, and A. release to B. before inrolment, such release is void.¹³ So, if a disseisor bargain and sell the lands, and the disseesee release to the bargainer before inrolment, the release is inoperative;¹⁴ but a release to the bargainer will, in such case, enure for the benefit of the bargainer.¹⁵

*But if a *bargainer* before inrolment convey the [*68] estate by bargain and sale to another person, and then inrol the first deed: the second bargain and sale is void, though it should afterwards be inrolled.¹⁶ So, a lease made by a bargainer before inrolment is not valid.¹⁷

Though the inrolment has a relation to the delivery of the deed, and thereby avoids all mesne incumbrances and conveyances made by the *bargainer*; yet it does not divest any estate lawfully settled in the bargainer in the interim;¹⁸ therefore if a feoffment be made, or fine levied by the bargainer to the bargainer before inrolment, he shall take by the feoffment, or fine, and not by the bargain and sale.¹⁹

⁶ Co. Litt. 186, a. Cro. Car. 217, 569. Bro. Inr. pl. 9.

⁷ Ow. 70.

⁸ Cro. Car. 217. See 2 Buls. 8, 9.

⁹ Latch. 157. 1 Sid. 310.

¹⁰ Ow. 69, 150. Dy. 218. Godb. 156.

¹¹ Cro. Car. 217. ¹² 2 Inst. 675.

¹³ Shep. T. 227.

¹⁴ 1 Roll. Rep. 425.

¹⁵ Mockett's case, Shep. T. 227.

¹⁶ Sir Robert Barker's case, Shep. T. 227. Bellingham v. Alsop, Cro. Jac. 52, 409. See Perry v. Bowes, 1 Vent. 360. T. Jones, 169.

¹⁷ Cro. Car. 110. Carth. 178.

¹⁸ 4 Co. 71, a., Hynd's case.

¹⁸ 2 inst. 671, 672. Shep. T. 226. Northumberland's case, Moor. 337. Popham's case, 4 Leon. 4. Ante, tit. Grant, sec. 2.

(11.) By a provision in the Statute of Inrolments, that act does not extend to hereditaments lying within any city, borough, or town corporate, wherein the mayors, recorders, or other officers, have authority to inrol deeds. A bargain and sale therefore of such hereditaments open[*69] rates to *all purposes from the date or delivery of the deed.²

² See Chibborne's case, Dy. 229. *Darley v. Bois*, Yelv. 123.

[Where power is given by will to executors to sell the real estate of the testator, a conveyance under the power is called a bargain and sale, and the operative words being usually (though not necessarily), "bargain and sell." (With respect to the expressions which will create such a power, as distinguished from a devise of the lands, see *Doe v. Shotter*, 8 Adol. & El. 905, and the authorities there cited; *Knocker v. Bunbury*, 6 Bing. N. C. 306.) This conveyance by the executors, however, takes effect, not under the Statute of Uses, but as a common law conveyance, and consequently raises a seisin on which the ordinary uses in bar of dower, or any other uses, may be limited. It requires no inrolment; and being a disposition of the legal estate by virtue of the power, it must also be distinguished from a disposition under a power of appointment operating as a mere limitation of the use.]

A conveyance of the real estate of a bankrupt by the commissioners to the assignees, under the Bankrupt Act, 6 Geo. 4, c. 16, (s. 64), was also called a bargain and sale, and under the provisions of that act, required inrolment; but neither did this conveyance operate under the Statute of Uses, being a transfer of the legal estate under a statutory power; and it further differed from a proper bargain and sale in having no specific time prescribed for the inrolment of it, and in passing nothing until it was inrolled. *Perry v. Bowes*, T. Jones, 196. 1 Ventr. 360. *Doe v. Mitchell*, 2 Mau. & Sel. 446. Now by statute 1 & 2 Will. 4, c. 56, the real estate of the bankrupt which might have been conveyed by the commissioners to the assignees, vests in the assignees by virtue of their appointment, without any conveyance for that purpose. Sec. 26.

But the copyhold lands of a bankrupt were not included in the conveyance from the commissioners to the assignees under the act 6 Geo. 4, c. 16. By that act (s. 68), the commissioners were empowered (and this power may now be exercised by any one commissioner, 1 & 2 Will. 4, c. 56, ss. 7 & 16; 5 & 6 Vic. c. 122, ss. 46, 59, 66), by deed indented and inrolled to make sale of the bankrupt's copyhold and customaryhold lands, and thereby to authorise any person or persons on their behalf to surrender the same for the purpose of the purchaser being admitted thereto.

Another assurance commonly called a bargain and sale is the disposition of lands, whether freehold or copyhold, (5 Barn. & Ald. 462), of which a bankrupt is seized in tail. By statute 1 Jac. 1, c. 19, s. 12, the commissioners were empowered by deed indented and inrolled, to grant, bargain, sell, and convey any lands whereof the bankrupt was seized in tail, to any person or persons for the relief and benefit of the creditors; and it appears to have been considered, that by virtue of this provision the general bargain and sale of the bankrupt's real estate by the commissioners to the assignees, extended to lands of which the bankrupt was tenant in tail, and vested the fee-simple of such lands in the assignees. 3 Bro. C. C. 595. *Jervis v. Tayleur*, 3 Barn. & Ald. 557. By a clause in the later act of 6 Geo. 4, c. 16, s. 65, the commissioners were directed to make sale by deed indented and inrolled of any lands of which a bankrupt was seized for any estate tail; and it has been held, that under this act also, though differently worded from that of 1 Jac. 1, c. 19, the general bargain and sale from the commissioners to the assignees, passed the freehold lands of which the bankrupt was tenant in tail. *Ex parte Somerville*, 1 Mon. & A. 408; 3 Dea. & Ch. 668. If this decision be correct, then under the act 1 & 2 Will. 4, c. 56, by which

(12.) By the statute 10 Ann. c. 18, s. 3, after reciting that "for supplying a failure in pleading *or deriving the title to lands, tenements, or hereditaments, conveyed by deeds of bargain and sale, indented and inrolled according to the statute made in the twenty-seventh year of the reign of king Henry the Eighth, for inrolment of bargains *and sales, where the original indentures of bargain and sale to be showed forth or produced, are wanting, which often happens, especially where divers lands, tenements, or hereditaments are comprised in the same indenture, and afterwards derived to different persons; be it further enacted, by the authority aforesaid, that where in any declaration, avowry, bar, replication, or other pleading whatsoever, any such indenture of bargain and sale inrolled, shall be pleaded with a *profert in curia*, or offer to produce the same, the person or persons so pleading, shall and may produce and show forth, and be suffered and allowed to produce and show forth, by the authority of this act, to answer such profert, as well against her Majesty, her heirs and successors, as against any other person or persons, a copy of the *inrolment of such bargain and sale; and such copy examined with the inrolment, and signed by a proper officer, having the custody of such inrolment, and proved upon oath to be a true copy so examined and signed, shall be of the same force and effect, to all intents and constructions of

(s. 26) all such real estate of the bankrupt as had previously to be conveyed by the commissioners to the assignees, is vested in the latter by virtue of their appointment, the freehold lands of which the bankrupt was tenant in tail in possession would have vested in the assignees for an estate in fee simple, and the conveyance to a purchaser would have been from the assignees, and not from a commissioner or commissioners. But an opposite construction is countenanced by a subsequent act, so far as those provisions of it which relate to this subject can be considered as declaratory. This is the act for the abolition of fines and recoveries (3 & 4 Will. 4, c. 74), by which it is enacted, that any commissioner shall by deed dispose of lands of which the bankrupt is tenant in tail to a purchaser for valuable consideration, and shall create by any such disposition as large an estate in the lands disposed of as the tenant in tail, if he had not become bankrupt, could have done under that act at the time of such disposition. If such entailed lands are not held by copy of court roll, the deed is to be inrolled in Chancery within six calendar months after the execution thereof; and where the lands are copyhold, the deed is to be entered on the court rolls of the manor (ss. 55, 56, & 59): and a deed inrolled under this act takes effect from the time of the execution: sec. 74; 4 Yo. & Col. 237.]

law, as the said indentures of bargain and sale were and should be of, if the same were in such case produced and shown forth."

[*73] *LEASE AND RELEASE.

(1.) A RELEASE, enlarging an estate already created, is a conveyance derived wholly from the common law; and it requires, in all cases, privity of estate between the releasor and releasee.³ Thus if land be in the possession of a lessee at will,⁴ for life, or years,⁵ there exists a privity of estate between him and the lessor; and the latter may execute a release of his estate either to the lessee himself or to his assignee.⁶ So, the person seised of the inheritance in reversion or remainder, may release it to the tenant of the freehold; whether such tenant be by the courtesy, or in dower,⁷ or for his own life, or for that of another.⁸ But a release of this kind will not operate upon the possession of an under-lessee,⁹ or of a tenant at sufferance,¹ by *elegit*, or statute merchant.²

*When no estate precedes the lesser estate intended to be enlarged by the release, *an actual possession* is necessary at the common law to the operation of the release.³ But if there be tenant for life, remainder for life, with the reversion in fee, the person in reversion may release to him in remainder for life;⁴ for though he has no possession, yet he has an estate actually vested in him.

(2.) The release just described was a *secondary* conveyance, operating upon an estate originally created

³ Co. Litt. 272, b.

⁴ Litt. sec. 460.

⁵ Ibid. 465.

⁶ 2 Roll. Ab. 401, pl. 9. Dy. 4, pl. 2,

⁸ Co. Litt. 273, b.

⁷ 2 Roll. Ab. 401, pl. 8.

⁹ Co. Litt. 273, a. Dy. 4, pl. 2.

¹ Co. Litt. 270, a. 271, a.

² 2 Roll. Ab. 401, pl. 12. Co. Litt. 273, b. Shep. T. 324. [See Co. Litt. 270, b. According to the books cited (except Rolle, who refers to authorities *pro* and *contra*, a tenant by *elegit*, or statute merchant, is capable of taking a release.)]

³ Co. Litt. 270, a. Litt. sec. 459.

² Roll. Ab. 400, pl. 4, 5. Co. Litt. 270, a.

without any reference to it. But in very early periods of our history it was not unusual to execute a lease for two or three years, completed by the actual entry of the lessee, for the express purpose of enabling him to receive a release of the inheritance; and which was accordingly made to him within a short time afterwards. The lease and release, executed in this manner, transferred the freehold of the releasor as effectually as if it had been conveyed by fine or feoffment. Whether the lesser estate were merged, or whether it were merely enlarged by the accession of the greater, it certainly did not exist separately from it. Thus a lease for years, and a release founded upon it, had the operation of *one* conveyance; and so far back as the reign of Henry the Fourth, they are considered as "equivalent to a feoffment in [*75] passing the freehold." In the Year Book, 21 [*75] Edw. 4, 24, the conveyance by lease and release is expressly mentioned.

An entry by the lessee for years was necessary to perfect his lease at the common law. He could not receive a release, until he had acquired the actual possession. It is therefore probable, that the conveyance by lease and release was not frequently adopted before the Statute of Uses; because it was nearly as inconvenient, and not so powerful in its operation, as a feoffment with livery. But soon after that statute, a conveyance, differing only from the *lease and release* at common law in the manner of creating the previous estate for a year, but retaining the same name, derived from the same principles, and operating in the same manner, was introduced, as it is said,⁵ by Serjeant Moore; a conveyance which has almost wholly superseded that by feoffment.

A bargain and sale being made for one year upon a pecuniary consideration, the legal estate is immediately vested in the bargainer by the Statute of Uses. This bargain and sale does not require *inrolment*⁶ under the statute 27 Hen. 8, c. 16; and it is now settled beyond controversy, that the estate vested in the bargainer upon

⁵ See Year Book, 11. Hen. 4, 33; and also 5 Vin. 143, pl. 4, and note.

⁶ See 2 Black. Com. 339.

⁷ 2 Co. 36, a. 8 Co. 94, a.

[*76] the *execution of the deed, is capable of receiving a release of the reversion before or without an *actual entry* by him.⁸ A release, generally dated the day after the bargain and sale,⁹ is accordingly made; and thus an estate of freehold is transferred without entry, inrolment, or livery of seisin.

(3.) It is immaterial to the operation of the *release*, whether the previous estate for a year be created by a bargain and sale under the Statute of Uses, or by a lease at common law, perfected by the entry of the lessee. In either case the conveyance operates by *transmutation of possession*. It transfers a *seisin* to the releasee; and if the use be declared to him, he takes an estate not by virtue of the Statute of Uses, but in the course of possession at the common law.¹ But if the use be declared to any *other* person or persons, then it is executed by the statute; and it is now usual to make settlements of freehold estates by lease and release, in which the limitations of uses are frequently various and intricate.

[*77] *(4.) When the release is founded upon a bargain and sale for a year, it is necessary that the person making the conveyance should be capable of standing seized to a use. But if the releasor be incapable of standing seized to a use, then the estate for a year should be created by a lease at common law, accompanied by an *actual entry* on the part of the lessee.

(5.) The conveyance by lease and release, like a bargain and sale, does not work a discontinuance,² nor create a forfeiture;³ neither can it destroy contingent remainders.⁴

(6.) It has been doubted whether there can be a *resulting use* in fee upon a conveyance by lease and release.

⁸ Cro. Car. 110. Cro. Jac. 804. Carter, 66.

⁹ [But if the lease and release were dated the same day, the estate would be transferred, provided the release were executed after the lease. And it seems, that where the lease and release bear date the same day, the lease would be presumed to have been first executed in the absence of evidence to the contrary.]

¹ Burr. 106.]

² See an excellent opinion of Mr. Booth, vol. ii. of Cases and Op. 281, 289. See vol. i. 89, 165. [Jenkin v. Peace, 6 Mee. & Wels. 722.]

³ Litt. s. 598, 606. [Now, as to discontinuance, see 3 & 4 Will. 4, c. 27, s. 39.]

⁴ Litt. s. 600.

⁴ See Fearne, 322, 9th ed.

H. brought covenant as assignee of a reversion, and showed that the lessor, in consideration of five shillings, bargained and sold to him for a year, and afterwards released to him and his heirs, *virtute quarundam indentur' bargainiae venditionis et relaxationis, necnon vigore statuti de usibus, &c.*, he was seised in fee; and it was objected, that the use must be intended to be to the *releasor* and his heirs, because no consideration *⁷⁸ of the release, nor express use, appeared by the pleading.⁵

It was argued in this case,⁶ that there could be no resulting use on a lease and release: that nothing passes to the lessee in possession, but by way of *enlargement* of his estate; that it does not operate to give a new estate of the reversion, but to increase the estate in possession, according to the words of the release: that if the release enure only to enlarge the estate, the interest enlarged must be to the use of the lessee, or it cannot be said to be an increase of it: that if the practice had not prevailed to the contrary, it were very odd to limit the use of a release to any but the lessee; for which reason it is, that we find it expressed in the clause in the lease, on which the lessor intends to build his release, that the intent of the lease was to pass an estate by release upon it, for the benefit or use of a third person:

That it would be absurd to say, that my conveyance should have no other operation but to extinguish or merge the estate, which the grantee has already, in order to have it brought back to me; and what need could there be of such a way? If the party had any such intent, it might soon be done by a surrender:

*That if it had been expressed in the deed of ^[*79] release, that he had already made him a lease for years, and that for the enlargement of that estate he made the release, there could be no doubt but that it would be to the use of the *releasee*; and there is no difference between the cases, since this release, in its own nature, enures by way of enlargement: besides, here is also a valuable consideration: for the lease and release

⁵ *Shortridge v. Lamplugh*, 2 Salk. 678. 7 Mod. 71. 2 Ld. Raym. 798.

⁶ 7 Mod. 74.

being but *one* conveyance, the five shillings, expressed to be the consideration of the *lease*, shall be participated to the release; and also the acceptance of the release is in its own nature a consideration; for it implies an alteration of the estate of the lessee, which, to consent to, is a consideration moving from the lessee; and the only motive of the lessee's parting with the old estate was to get a new one.

On the other side⁷ it was urged, that before the statute 27 Hen. 8, c. 10, if A. made a feoffment, levied a fine, or suffered a recovery without a use declared, and without any consideration, the feoffee, conuzee, or recoveror stood seised of the said lands to the use of A.: that since the statute of Hen. 8, the law as to this matter is not altered: for the said statute only intended to execute the use to the possession, and by that means to destroy the use; but it did not intend to make any other thing [*80] pass by the conveyance, *than that which passed before: that there was the same reason that the use should not pass in a *release* without any consideration, or express declaration, as in a feoffment, fine, and recovery:

To the objection, that this release enured by way of enlargement of the lease for a year, and therefore would participate of the consideration of it, and that the lease and release made but *one* conveyance, it was answered, that though the lease and release made but one conveyance as to the passing of the fee, yet they were in truth *distinct* conveyances, and had different operations, the one by the Statute of Uses, and the other by the common law: that as to what is said, that the release enures by way of enlargement of the estate of the lessee, it is true that it gives him a greater estate than he had before; but that notwithstanding it destroys the estate for years by *merger*; and it cannot participate of the consideration contained in the *lease*, which is perfectly distinct.

However, Holt, C. J., without considering the operation of the conveyance,⁸ maintained that the manner of

⁷ 2 Ld. Raym. 800.

⁸ See 2 Salk. 678.

pleading the release as above, to the releasee was good; and that if a *feoffment* be pleaded in the same manner, without showing the use or consideration, with an averment *virtute cuius* the feoffee was seised, the use shall be *intended to be to the feoffee; and that was the [*81] form of pleading *before* the statute, and the statute has not altered, but rather confirmed, this manner of pleading.

Lord Hardwicke, in the case of *Lloyd v. Spillet*,⁹ considered the conveyance by lease and release exactly in the same light as that by *feoffment* with respect to a resulting use; and though he held that either an express declaration, or consideration however trifling, would carry a use to the releasee, yet the whole tenor of his argument gives reason to believe that he took it to be a settled point, that without the one or the other the use would result to the releasor.¹

Supposing a release to be made to a lessee for years, whose estate was not originally created with a view of receiving such release, there can be no doubt that the releasee would be entitled to the use and legal estate; because the intention of the parties and the purposes of the release would be entirely frustrated, if the use should result to the releasor. But when a lease, or bargain and sale for a year, is made for the *express purpose* of receiving a release, they must be considered as *one* conveyance,² operating by *way of transmutation of the [*82] possession or seisin to the releasee; and admitting

⁹ Barn. Cha. Rep. 384. 2 Atk. 148.

¹ See *Lil. Con.* 233. 1 Wood's *Con.* 776, and note. 2 *Dougl.* 745.

² [There are other cases in which it is important to ascertain how far, and in what sense, this position that the lease and release must be considered as one conveyance is correct; for instance, do they so far amount to one assurance as to render it necessary to enrol the lease for a year as well as the release, under the act for the abolition of fines and recoveries (3 & 4 Will. 4, c. 74, s. 41)? It may be true that the lease and release are to be treated as one conveyance so far as such a construction is necessary to give effect to the intention of the parties; but in point of fact, and of law, these two instruments are as distinct from each other as a release to a tenant in actual possession under a lease at common law is distinct from the lease. (*Jenkin v. Peace*, 6 *Mee. & Wels.* 722.) The circumstance of the lease for a year being made for the express purpose of receiving a release can make no difference; since it is clear that the former would have its full operation, (the estate being immediately vested in the bargainer by force of the Statute of Uses,) although the release were never to be made at all. It is in this respect that the conveyance by lease and release differs from that by feoffment; the lease for a year being in itself (by virtue of the Statute of Uses,

that the doctrine of resulting uses was introduced in order to regulate and carry into effect the *intention* of the [*83] *parties, and that the payment of a pecuniary consideration, however inconsiderable, was a criterion of such intention, I cannot see how the conveyance by lease and release can in this respect differ from that by feoffment, fine, or recovery. In the above case of *Shortridge v. Lamplugh*, both Holt and Powell agreed,³ that if a particular use were limited on the release, the remainder would result. Why? Because such construction would favour the *intention*. The [*84] *notion of resulting uses was adopted for that very purpose.

(7.) It is necessary at the common law, that an *exchange* or a *partition* should be completed by an *actual entry*.⁴

and exclusively of the release,) as complete an assurance as a feoffment perfected by livery of seisin, or as a lease at common law, accompanied by possession. If tenant in tail subject to a lease convey the remainder in fee, either by release to the lessee, or by grant to a third party, the lease, of course, does not require enrolment; and it is submitted, that the object for which the term was created, or the length of the term, cannot make any difference in this respect; and that in all cases of a release in fee by tenant in tail, the release itself is the only disentailing assurance to be enrolled. In a case where the release alone has been enrolled, to consider the lease as part of the disentailing assurance, with reference to the enrolment, would be to do unnecessary violence to the strict legal construction and operation of the two instruments, for the purpose, not of aiding, but of defeating, the intention of the parties. If it should be held necessary to enrol the lease as well as the release, a curious question might arise with reference to assurances under the act 4 & 5 Vic. c. 21, by which a release is rendered as effectual for the conveyance of freehold estates as a lease and release by the same parties. For it is merely enacted, that a deed of release expressed to be made in pursuance of the act, shall operate as if the releasing party had also *executed* a lease for a year. But the execution of an instrument is one thing, and the enrolment of it another; and it would be open to contend that such a release, when enrolled, must operate as if the releasor had *executed* both lease and release, but had enrolled the release alone. "No instance can be found where the court have presumed that an enrolment has been made," 3 Barn. & Ald. 151. The same observation would apply still more forcibly to disentailing assurances by lease and release under the Irish act for the abolition of fines and recoveries, (4 & 5 Will. 4, c. 92,) which is similar to the English act. The Irish statutes 9 Geo. 2, c. 5, and 1 Geo. 3, c. 3, do not in terms abolish the lease for a year, nor, like the English act 4 & 5 Vic. c. 21, furnish a substitute for it: they merely provide that the recital of the lease in the release itself, shall be sufficient evidence of the lease, and that in pleading a lease and release, it shall only be necessary to produce the latter. But the recital of the lease for a year, proves the *existence* of it, and nothing else; and it cannot be maintained that the mere recital has, with reference to the question of enrolment, any greater efficacy than the actual production of the instrument itself would have. It would follow, therefore, that the lease must be actually executed in order that it might be enrolled. It is proper to add, that the more received opinion is, that the lease, as well as the release, requires enrolment.]

³ 7 Mod. 77.

⁴ See Co. Litt. 266, b.

But it is now usual to make an exchange by a bargain and sale for a year, and a release grounded upon it; and if joint-tenants or tenants in common concur in a conveyance by lease and release, and thereby transfer the entire seisin to the releasee, they may effectuate a partition by limiting the uses of the specific allotments. It is unnecessary to observe, that in all these cases the possession is executed by the statute without, or before, entry.

Where exchanges are effected by the means of powers operating under the Statute of Uses, there can be no implied right of entry, or eviction, as on an exchange at common law, because the right of entry must be descendible to the heir, and not transmitted from *cestui que use* to *cestui que use* in succession: and the entry by *cestui que use* for life could not acquire for him a fee-simple as of his old estate.

It may be doubted whether a proviso inserted in an exchange under a power, for shifting the use in case of eviction would not be void; for each party would take an estate subject to a springing *use, which could [*85] not be defeated by the owners of the estate subject to it: and this would probably be considered too remote, and as amounting to a perpetuity. See vol. i. 201, et seq.⁵.

⁵ [By 4 & 5 Vic. c. 21, a deed of release of a freehold estate *expressed to be made in pursuance of that act*, is rendered as effectual for the purposes expressed in the deed, and as a conveyance to uses, or otherwise, as if the releasing party or parties had also executed a bargain and sale for a year. As a conveyance under this act has the advantage in point of simplicity and economy over a conveyance by lease and release, the lease for a year must in practice eventually become obsolete.

By this act a new species of conveyance has been introduced which neither requires any ceremony, such as livery of seisin, or inrolment, to perfect it, nor is grounded upon the fictitious possession under a bargain and sale for a year. So long as the notoriety of a conveyance was of importance, for the reasons assigned in the preamble to the Statute of Uses, the livery of seisin, or the inrolment of the deed, was something more than a mere form. When, however, the tenure of free and common socage had been established for all freehold lands (by stat. 12 Ch. 2, c. 24,) and the action of ejectment, (which is brought against the party in actual possession, whatever may be the nature of his title,) had become the usual process for trying the right to freehold estates, the principle of notoriety was abandoned, without any attempt on the part of the legislature to enforce it; and the general adoption of the conveyance by lease and release, (which was a mere technical artifice for evading the provisions of the Statute of Inrolments,) was not found to be attended with any inconvenience. But if freehold estates in possession may be conveniently transferred by deed alone, without the super-added ceremony of livery of seisin, or inrolment, there can be no good reason for retaining the legal fiction (namely, the imaginary possession under the lease).

***A N A P P O I N T M E N T.**

(1.) WE must distinguish between an appointment and the declaration of a use. The latter is that original disposition of the use by the express consent of the parties, which prevents it from following any implied designation, which the rules of law might otherwise prescribe : but the former is a limitation of the use by a separate instrument derived from and conformable to, a power reserved, or contained, in the original conveyance, by which the seisin to serve those uses is transferred. The limitation of uses thus made under the power must necessarily alter, abridge, or suspend the use previously declared upon such original conveyance. Such are the powers usually reserved in settlements of leasing, jointuring, selling, exchanging, and charging.*

(2.) Every appointment, when made immediately to the appointee, must consequently vest the use or legal estate in him ; and therefore *if A., in pursuance [*88] of a power, limit an estate to B. to the use of C., the use to C. cannot be executed by the statute. But as the use, under an appointment, is served out of the original seisin of the feoffees or releasees to uses, it is capable of the same modifications as the use declared upon the original conveyance. Suppose a feoffment or lease and release made to J. S. and his heirs, to such

for a year) by which the ceremony was evaded. And this is the view adopted by the new statute, which renders the lease for a year unnecessary, without recurring to livery of seisin, or enrolment. At the same time, however, the necessity of an express reference to the statute itself is the introduction of a new formality into a conveyance for which there appears to be no sufficient motive. One step more only is required to render the conveyance of a freehold estate in possession as simple as that of a freehold estate in remainder ; and every ground which formerly existed for rendering the one more formal than the other has now ceased to exist. If deemed requisite for fiscal purposes, it would be easy to subject a deed intended to transfer a legal estate of freehold in possession to an additional stamp duty, without incumbering the deed itself with any new formality in the room of those which are rendered unnecessary.

Although, however, the statute 4 & 5 Vic. c. 21, has introduced a new form of conveyance, yet the release under that act will operate in all respects as if it were founded on a lease for a year, and will therefore be subject to the same rules, so far as relates to the construction and effect of the instrument, as the old release.]

* See ante, vol. i. ch. 2, s. 5 (8).

uses as A. B. shall appoint, and in default of, and until appointment, to certain uses therein declared. A. B., in pursuance of his power, appoints, that J. S. and his heirs shall stand seised to the uses following; *viz.* to the use of himself for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail. The use in this case will be executed in A. B., and the trustees to preserve, &c., immediately; and in the sons, when they are born.

(3.) When a person may dispose of an estate either under a power of appointment, or as the absolute owner of it, it is necessary, if he wish to convey in pursuance of the appointment, that the power should be *recited* or *referred to*: but when a disposition cannot take effect but as an appointment or limitation of the use, then there is no absolute necessity that the appointer should notice the power, or convey in pursuance of it.⁷ Thus if [*89]
*A. make a feoffment, levy a fine, suffer a recovery,
or convey by lease and release to B. and his heirs to such uses as A. shall by deed or will appoint, and in default of such appointment, to the use of A. in fee; as A. in this case may appoint the land, or dispose of it as the legal proprietor, if he make his will, and without *referring to* or *reciting* the power, devise the land generally, the will must take effect as a devise of the land, and not as a disposition of the use.⁸ Lord Coke, indeed, makes a distinction between a feoffment to *such uses as the feoffor*

⁷ See 12 Mod. 468. *Andrews v. Emmot*, 2 Bro. C. C. 297. *Lawson v. Lawson*, 3 Bro. C. C. 272.

[But it must appear that the appointer had in view the estate which was the subject of the power. 1 Atk. 560. 1 Ball & Beat. 77. 5 Barn. & Cress. 720. 1 Sim. 28. It has been said that there are three tests of the intention to execute the power; first, where there is a reference to the power; secondly, where there is a reference to the property which is the subject of the power; and thirdly, where the provision made by the person intrusted with the power could have nothing to operate upon unless it were considered as an execution of the power. 2 H. Bl. 136, 3 Ves. 467. 1 Swans. 66, 1 Jac. & W. 352. 8 Ves. 609. *Standen v. Macnab*, 6 Bro. P. C. 193. *Morgan v. Surman*, 1 Taunt. 289. *Lewis v. Lewellyn*, 1 Turn. 104. *Denn v. Roake*, 6 Bing. 475. *Curteis v. Kenrick*, 3 Mee. & Wels. 461. 9 Sim. 447. And a general reference to all powers and authorities is for this purpose tantamount to an express reference to every particular power. *Bailey v. Lloyd*, 5 Russ. 330. But an express disposition of part of the subject, or of one of several subjects, of a power, does not necessarily indicate an intention to exercise the power as to the remaining part, or as to the other subjects. *Hughes v. Turner*, 3 My. & Ke. 666.]

* Co. Litt. 111, b. 112, a. 6 Co. 18, a.

shall by his last will appoint, and to the use of the feoffor's last will; for with respect to the latter he says, that if the feoffor make his will *with reference* to the power, yet [*90] it shall take *effect by virtue of the *devise*, and not as a limitation of the use.¹

(4.) The instrument executing the appointment, must be accompanied with all the ceremonies required by the power; such as sealing, signing, and the attestation of witnesses.¹ The deed itself, being merely the limitation of a use served out of a seisin transferred by another deed, cannot be considered as an independent conveyance. It is an instrument inapplicable to the transfer of property by a person conveying as the absolute proprietor. Yet an appointment may be, and frequently is, executed by a conveyance, which if not expressly or impliedly referring to the power, would operate upon the legal estate. Thus if releasees to uses in pursuance, and by virtue, of a power of selling and exchanging, reserved to them, convey by *lease and release*; the conveyance [*91] shall operate as a disposition of the use: and in *a case, where land was devised to B. for life, with a power to dispose of the fee to any of her children; it was determined that a conveyance by lease and release by B. to the use of herself during her life, with remainder to the use of her children, was an effectual execution of the power.² Appointments, however, made in this manner, are always informal.

(5.) It is generally true that a use limited by virtue of a power of appointment has relation to the conveyance, in which the power is contained.³ Therefore if an estate be limited to the use of such persons as a pur-

¹ Har. Co. Litt. 112, a. n. 2. Moor, 280.

² [A power to appoint by will "signed and published in the presence of, and attested by, three or more credible witnesses," was held to be well executed by a will, the attestations to which stated it to have been signed, sealed, and delivered in the presence of three witnesses, on the ground that delivery is equivalent to publication. Curteis v. Kenrick, 3, Mee. & Wels. 461.]

Now, by stat. 7 Will. 4 & 1 Vic. c. 26, s. 10, no appointment made by will in exercise of any power will be valid unless executed as required by that act; and every will executed in manner therein required, will, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, although expressly directed to be executed with some additional or other form of execution or solemnity.]

³ See Tomlinson v. Dighton, 1 P. W. 149. Salk. 239.

⁴ See 1 Atk. 560, note 2.

chaser shall appoint, and in default of appointment to the use of the purchaser and his heirs; until the purchaser exercise the power, he is seised of a base and qualified fee, liable to be defeated by the execution of it; and if he die without making any appointment, his wife will be clearly entitled to her dower; but if he exercise his power, then a new use springs up, which entirely defeats the intermediate use limited in default of the appointment, and of course destroys the wife's right to dower.⁴ So, if an estate be conveyed to the use of A. for life, with many remainders over, and a power be reserved to A. to make leases, or a jointure upon an after-taken *wife; when A. exercises his power it takes effect [*92] by way of limitation of a use, which entirely overreaches and takes precedence of the other uses interfering with it.⁵

Upon the same principle, if there be a limitation of a use to A. for life, and after his decease to such uses as B. shall appoint, who afterwards in A.'s lifetime appoints the use to the right heirs of A.; in this case, it seems, that the limitation of the use to the right heirs of A. by virtue of the appointment unites with the life estate of A. so as to make the right heirs take by *descent*, and not by way of a contingent *remainder*.⁶ In cases like this, care should be taken to appoint the use immediately to the right heirs; therefore if B. make an appointment to C. in fee, to the use of the right heirs of A.; the legal estate or use is vested in C. by the appointment, and the right heirs of A. take only an *equitable* estate or *trust*. In this case the *legal* estate for life of A. cannot be incorporated with the equitable one limited to his right heirs, and consequently the remainder to his right heirs is contingent.

In some cases, however, an appointment does not relate back in point of time to the instrument by which it is created. Thus in the case of the Duke of Marlborough *v.* Lord Godolphin,⁷ *where Lord Sunderland by [*93] his will gave the interest of 30,000*l.* to his wife

⁴ Vide vol. i. 161, et seq.; and see Maundrell *v.* Maundrell, 7 Ves. 567. 10 Ves. 246. [Ray *v.* Pung, 5 Barn. & Ald. 561.]

⁵ See 1 P. W. 246, and vol. i. 175, et seq.

⁶ See Fearne, 74, 9th ed.

⁷ 2 Ves. 61.

during her life, and after her decease the principal to be distributed among such of his children, and in such manner and proportion as she by any deed, or will, or instrument, or writing in nature of a will, should direct and appoint: she, by her will reciting the power, gave 15,000*l.* to Lady Morpeth, and 2000*l.* to Mr. Spencer, who both died in the lifetime of the testatrix: the question was, whether the appointment had a relation back to the time of the death of Lord Sunderland, when the instrument which created the power took effect; for if it had, then the legacies given to Lady Morpeth and Mr. Spencer must be considered as having become vested in them during their lives. But Lord Hardwicke said, that nothing vested in them during their lives, and consequently that nothing was transmissible to their representatives; because every person claiming under the execution of a power, must claim not only according to the execution of the power, but according to the *nature* of the *instrument* by which that power is executed; and therefore a *will* in execution of such a power being always *revocable*, it is not complete till the death of the testatrix.⁸

(6.) By virtue of a power of appointment a person may, in a certain degree, effectuate a remote limitation, [*94] which, if placed in the original *deed, would be considered as tending to a perpetuity, and therefore void. Thus, if there be a limitation to B. for life, who at that time has no son, with a *general* power reserved to him to limit the uses in remainder to such persons as he shall appoint; here upon the birth of a son of the tenant for life, the use may be limited to such first son *for life*, remainder to his first and other sons in strict settlement; notwithstanding the persons to whom the estates are appointed were not in existence at the time of the execution of the conveyance in which the power is contained.⁹ But when the Duke of Marlborough

⁸ See 1 Ves. 139. 2 Ves. 612. *Lisle v. Lisle*, 1 Bro. C. C. 533.

⁹ [As the power given to B. in this case is a *general* power, that is, an absolute right of disposition, there seems to be no good reason for saying that any estates, of whatever description, limited under it, could be more open to objection, on the ground of perpetuity, than the same estates would be if created by an absolute owner. With reference to the doctrine of perpetuity, a general power by

gave a power to trustees by his will, on the birth of the sons of the tenant for life, therein named, to revoke *the uses limited to those sons *in tail*, and to [*95] limit the uses to such sons *for life*, remainder to the first and other sons of such sons severally and successively in tail male; it was holden that this power, as it tended to a perpetuity, was void.¹ It should seem, however, that if an estate be settled to the use of B. for life, with a power of appointing *to his children*, he may afterwards appoint an estate *for life* to a child unborn at the time of the creation of the power, though he cannot extend such appointment to the children of such child.²

*COVENANT

[*96]

TO STAND SEISED TO USES.

(1.) USES may be raised either upon a pecuniary consideration, or upon what is called a *good* consideration, which is that of blood or marriage. Whatever be the form of the conveyance creating and transferring a use

means of which the donee can bring the property at any time into the market, and dispose of it to any person and in any manner he may think proper, must be equivalent to a seisin in fee-simple: and it follows, that the period for the commencement of the limitations under such a power is the time of the execution of the power, and not of the creation. Butler's note to C. Litt. 271, b. 7 T. R. 196. Sug. on Pow. vol. i. p. 495, 6th ed. This absolute right of alienation constitutes a distinction between a general power, and a particular power by which the donee is restricted to some designated objects; and it is with respect to the latter description of power only, as having a tendency to perpetuity, that it has been established that no estate can be created by the exercise of the power which would not have been valid if limited in the deed creating the power.]

¹ See 3 Bro. P. C. 232, Tom. Ed.

² See Mr. Booth's op. Vol. ii. Cases and Opinions, 439.

[There is no doubt that such an appointment by B. would be valid; because the estate for life given to the unborn child will stand the proper test of its validity with reference to the rule against perpetuities; that is, it would have been valid if placed in the deed creating the power in lieu of the power itself. It is well settled that a person unborn may be made tenant for life, though no estate can be limited to the children of such unborn tenant for life as purchasers. Routledge v. Dorril, 2 Ves. jr. 357. Hay v. The Earl of Coventry, 3 T. R. 83. 5 Barn. & Ald. 464. 7 Bing. 535.]

upon the former consideration, it is a *bargain and sale*, and must be inrolled as such; but conveyances, raising uses upon, or by virtue of, the latter, are termed *covenants to stand seised*; and they are not within the words of the Statute of Inrolments, nor within the policy of it;³ because the consideration of blood and marriage is of a public nature.

(2.) The consideration of this conveyance is the foundation of it. The words *covenant to stand seised*, are therefore not absolutely necessary to its operation. A [*97] conveyance in the form of, and *void as a grant,⁴ feoffment,⁵ or release,⁶ may still take effect as a *covenant to stand seised*.⁷

In practice, the following case occasionally occurs. An estate, being settled upon A. for life, with remainder to the use of trustees and their heirs during his life, in trust to support contingent remainders, with remainder to the first and every other son of A. successively in tail, with remainders over; A., in order to enable his eldest son to suffer a common recovery, by deed, not operating as a feoffment, bargain and sale, or lease and release, *surrenders* to his son his estate for life. This deed cannot operate in strictness as a *surrender*, on account of the intervening estate of the trustees; but it is the prevailing opinion of the profession, that it will operate as a covenant to stand seised; and the validity of many titles depends upon this construction.⁸

[*98] (3.) It may be deemed an invariable rule, that *uses can only be raised upon a covenant to stand seised in consideration of blood or marriage.⁹ Thus, affection for the heirs male of the covenantor which he shall beget, brotherly love, and a desire that land should

³ See Plowd. 307.

⁴ See 2 Vent. 150. [3 Lev. 370. Doe v. Whittingham, 4 Taunt. 20. In this last case it was held, that a covenant to stand seised upon which the use is not to arise until after the decease of the covenantor and another party, is good.]

⁵ See Doe v. Simpson, 2 Wils. 22. [Doe v. Davies, 2 Mee. & Wels. 503. Thorne v. Thorne, ib. 512, n. [g.]]

⁶ Brown v. Jones, 1 Atk. 188. Roe v. Tranmer, 2 Wils. 75.

⁷ [So an indenture intended as a release, but which cannot operate as such, (Doungsworth v. Blair, 1 Keen, 801,) or a deed containing the words "giveth and settleth," may operate as a covenant to stand seised.]

⁸ See Crossing v. Scudamore, 1 Vent. 137. 2 Lev. 9. 22 Vin. 241, pl. 9, and Simpson v. Keyles, cited T. Raymond, 48, 49.

⁹ 2 Black. Com. 338. Cart. 139. Moor, 505.

continue in the covenantor's name and blood, are all good to raise uses by way of covenant.¹

We are to observe, that if the consideration appear, though it be not particularly expressed, yet it is sufficient to raise a use upon this conveyance. Therefore, if a man covenant to stand seised to the use of his wife, son, or cousin, without saying in consideration of the natural love which he bears towards them, the covenant will raise the use.² So, if a man, in consideration of natural love to his eldest son, covenant to stand seised to the use of such eldest son in tail, and afterwards to the use of his younger son, the consideration extends to the latter.³ If a man, in consideration of affection to a son or brother, covenant to stand seised to the use of such son or brother, and his wife, the covenant raises the use for the wife;⁴ or if a man, in consideration *that B. will marry his daughter, covenant to stand seised to [*99] the use of both, it is sufficient to carry the use to them accordingly.⁵

But if a covenant be made to stand seised to the use of a person related to the covenantor by blood or marriage, and of a stranger, the whole use will vest in the relation.⁶ Yet it is said, in Sheppard's Touchstone,⁷ that if I covenant with B. in consideration of the marriage of my son with his daughter, to stand seised to the use of R. (a stranger) for life, and after to the use of my son and his wife; in this case the use shall be executed in R. the stranger, because the remainder cannot be supported without a particular estate.

It seems, that if a man in consideration of money, and also of marriage, covenant to stand seised, the use will arise on the latter consideration only; and, consequently, if the marriage do not take effect, the use will never vest, though the money be actually paid.⁸ So, a consi-

¹ Plowd. 309. 2 Roll. Ab. 785. See the several cases collected in 22 Vin. 194 to 204. "If the use had been to the wife, and her heirs, it would have been good; for it could not be said, that the heirs of the wife were strangers to the consideration; for she bore all her heirs in herself." Per Raymond, C. J., in Goodtitle v. Pettoe, Fitzg. 299.

² 7 Co. 40, in Bedell's case. 2 Wils. 22.

³ Ibid. 2 Roll. Ab. 782, pl. 3.

⁴ 2 Roll. Ab. 784, pl. 2, 4.

⁵ Ibid. pl. 4.

⁶ Shep. T. 513.

⁷ 2 Roll. Ab. 784, pl. 3; 783, pl. 1.

⁸ Moor, 102.

deration consistent with the deed, or the considerations expressed in it, may be *averred*.⁹

As to the considerations of friendship, long acquaintance, of being school-fellows, affection to *a natural son, and that the King is head of the commonwealth; they will not raise uses by way of covenant to stand seised.¹

It is scarce necessary to notice, that if a man covenant to stand seised to the use of himself for life, with remainders over to his relations, and with a power for the tenant for life to make leases; this power is void, and cannot be exercised as the limitation of a use.² So, if a man should covenant to stand seised to the use of himself for life, with remainder to the use of trustees (who are not his relations), for the purpose of preserving contingent remainders, with remainder to his first and other sons in tail, &c.; no use would vest in the trustees, because the consideration does not extend to them. This is a principal reason why covenants to stand seised are fallen into disuse.

(4.) In order to render a covenant to stand seised effectual, the covenantor should have a vested estate in possession, reversion, or remainder. Therefore, a covenant to stand seised of land, which the covenantor shall afterwards purchase, is void.³ It is said, that if a joint-tenant covenant to stand seised of the moiety of his [*101] *companion after his death, it is void; although the covenantor survive.⁴

(5.) This conveyance, when made by a tenant in tail, cannot produce a discontinuance; and when made by a tenant for life, will not create a forfeiture; neither will it destroy contingent remainders depending upon such life-estate.

⁹ 7 Co. 40, a. 2 Roll. Ab. 790.

¹ See Plowd. 302. 2 Roll. Ab. 783. Co. Litt. 123, n. 8. 2 Co. 15, a. b.

² 2 Roll. Ab. 260. Cro. Jac. 181. So as to a general power of appointment, Goodtitle v. Pettoe. Fitzgib. 299.

³ Moor, 342. Cro. El. 401. 2 Roll. Ab. 790, pl. 8.

⁴ 2 Roll. Ab. 790, pl. 9.

*F E O F F M E N T.

THIS Indenture of three Parts, made this first day of February, in the year of our Lord one thousand seven hundred and ninety-nine: Between Andrew Akers of, &c., of the first part, Benjamin Brown of, &c., of the second part, and Charles Chivers of, &c., of the third part; WITNESSETH, That in consideration of the sum of £¹⁰³ of lawful money of Great Britain to the said A. Akers in hand paid by the said Benj. Brown at or before the sealing and delivery of these presents, the receipt of which said sum of £¹⁰³ he the said A. Akers doth hereby acknowledge, and of and from the same, and every part thereof, doth acquit, release, and discharge the said B. Brown, his heirs, executors, administrators, and assigns, and every of them, for ever by these presents; He, the said A. Akers, Hath granted, aliened, enfeoffed, and confirmed and by these presents Doth grant, alien, enfeoff and confirm unto the said Benjamin Brown, his heirs and assigns, All those pieces or parcels of land, &c., &c. And also all woods and under-woods, timber and other trees, mounds, hedges, ditches, fences, ways, paths, passages, waters, water-courses, *easements, advantages, and appurtenances to the said pieces or parcels of land and hereditaments, or any of them, or any part thereof, belonging or in any wise appertaining, or to or with the same, or any of them, or any part thereof, now or at any time heretofore usually held, occupied, or enjoyed, or accepted, deemed, taken, or known, as part, parcel, or member thereof; and all the estate, right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of him the said Andrew Akers in, to, or out of the same, and every part thereof; To HAVE AND TO HOLD the said pieces or parcels of land, hereditaments, and other the premises hereby granted and enfeoffed, or intended so to be, with the appurtenances, unto the said Benjamin Brown, his heirs and assigns, to the only use and behoof of the said Benjamin Brown, his heirs and assigns, for

ever. And the said Andrew Akers hath granted for himself and his heirs, That he the said Andrew Akers, and his heirs, all and every the said lands, hereditaments, and premises above granted and enfeoffed, or intended so to be, unto the said Benjamin Brown, his heirs and assigns, against him the said Andrew Akers, his heirs and assigns, and against all and every other person and persons whomsoever, shall and will warrant and for ever defend by these presents. And the said Andrew Akers hath nominated, constituted, and appointed, and by these presents doth nominate, constitute, and appoint the said Charles Chivers his true and lawful *attor-
[*104]ney, for him and in his name and stead, to enter into, and take full, quiet, and peaceable possession and seisin of, all and singular the above-mentioned premises, or some part thereof in the name of the whole, and then to deliver full, quiet, and peaceable possession and seisin of all and singular the premises, or some part thereof in the name of the whole, unto the said Benjamin Brown, or to his attorney in that behalf lawfully authorised, according to the form and effect, and true intent and meaning, of these presents. In witness, &c.

BE IT REMEMBERED, That on this day
of in the year first within written, full
and peaceable possession and seisin were had and
taken by the within named Charles Chivers, of
the lands and hereditaments within mentioned to
be granted and enfeoffed, and were in the name
of the within mentioned Andrew Akers delivered
by the said Chas. Chivers to the within named
Benjamin Brown; To Hold the same unto the
said Benjamin Brown, his heirs and assigns for
ever, according to the form and effect and true
intent and meaning of the within written Inden-
ture, in the presence of

***FEOFFMENT BY A CORPORATION,**

ON A SALE MADE UNDER THE ACT FOR THE REGULATION OF MUNICIPAL CORPORATIONS, IN ENGLAND AND WALES,⁵ (5 & 6 WILL. 4, c. 76, ss. 6 & 94. See also 6 & 7 WILL. 4, c. 104, s. 2.)

THIS INDENTURE made the first day of May, in the year of our Lord one thousand eight hundred and forty-two, Between the Mayor, Aldermen, and Burgesses of the Borough of B., in the County of S., of the first part; T. R., of, &c., (the treasurer of the said borough), of the second part; the Right Honourable A. B., and C. D., and E. F., Esquires (three of the Lords Commissioners of Her Majesty's Treasury), of the third part; G. H., of, &c., of the *fourth part; M. N., of, &c., of the [*106] fifth part; and T. Y. of, &c., of the sixth part.

WHEREAS the council of the said borough of B., having deemed it expedient to sell part of the hereditaments of the corporation of the said borough, in order to provide a fund for the erection of a gaol in such borough, did in pursuance of a resolution in that behalf passed at a meeting of the said council, held in pursuance of the act for providing for the regulation of Municipal Corporations in England and Wales on the day of (previous notice thereof having been given as directed by the said act,) and at which meeting not less than one-third part of the number of the whole council of the said borough were present, and Y. Z., the mayor of the said borough presided, and which resolution was⁶ at such meeting entered in the minute-book of the said council, and signed by the said Y. Z., send a memorial to the Lords Commissioners of Her Majesty's said Treasury, representing the circumstances of the case, and applying

⁵ [By the 6th sec. of this act the body corporate takes the name of the mayor, aldermen and burgesses, and *by that name* is capable in law to act *by the council*. There seems, therefore, to be no ground for a doubt entertained by some, whether the council, or the councillors by name, should not, under the 94th sec., be made parties to a conveyance from the corporation. The 94th sec. confers no new powers; it is merely a restraining clause, the object of it being to subject to certain restrictions the right of alienation transferred to the new corporate body by the 6th sec.; and therefore, the members of the council can have no power of disposition apart from their corporate capacity.]

⁶ [This must be done at the meeting, and not afterwards. 8 Adol. & El. 266.]

to the said Lords Commissioners to approve of a sale of such of the hereditaments of the said corporation as were specified or mentioned in the schedule written under the said memorial, and of which the messuages or tenements and hereditaments hereinafter described and [*107] intended to be hereby *granted and enfeoffed were part. AND WHEREAS notice of the intention of the said council to make such application as aforesaid was fixed on the outer door of the town hall of the said borough, on the day of (being one calendar month before such application); and a copy of the memorial intended to be sent, and which was accordingly sent as aforesaid to the said Lords Commissioners, was kept in the town clerk's office during such calendar month, and was freely open to the inspection of every burgess at all reasonable hours during the same.

AND WHEREAS the said council did, on the day of with the approbation of the said Lords Commissioners, parties hereto of the third part, given in compliance with the said application, and testified by their respectively being parties to and executing these presents, cause the said hereditaments specified or mentioned in the said schedule written under the said memorial, to be put up for sale by public auction at the town hall in the said borough, in various lots, and subject to certain conditions then and there produced; and at such auction the said G. H. was the highest bidder for and declared the purchaser of lot 1, (being the said messuages or tenements and hereditaments hereinafter described and intended to be hereby granted and enfeoffed), at, or for the price or sum of £ .

[*108] Now THIS INDENTURE WITNESSETH that in *consideration of the sum of £ of lawful money of Great Britain, to the said T. R., as such treasurer as aforesaid, in hand paid by the said G. H., at or before the sealing and delivery of these presents, the receipt of which said sum the said T. R., and also the said mayor, aldermen, and burgesses, do hereby respectively acknowledge, and of and from the same do hereby respectively acquit, release, and discharge the said G. H., his heirs, executors, administrators, and assigns; the said

mayor, aldermen, and burgesses, with such approbation of the said Lords Commissioners of Her Majesty's Treasury, parties hereto of the third part, and so testified as aforesaid; Have granted sold, alienated enfeoffed, and confirmed, and by these presents Do grant, sell, alienate, enfeoff, and confirm unto the said G. H., and his heirs, All those messuages, or tenements, &c.; And all ways, waters, watercourses, lights, easements, privileges, advantages, emoluments, rights, members and appurtenances to the said messuages or tenements and hereditaments respectively belonging, or in any wise appertaining, or with the same, or any of them, or any part thereof, now, or at any time heretofore, usually held, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof; AND all the estate, right, title, interest, property, claim and demand whatsoever at law and in equity of the said mayor, aldermen and burgesses, in, to, and out of the same premises, and every part thereof; To HAVE AND TO HOLD the said messuages or *tenements and hereditaments hereinbefore described, and expressed to be [*109] hereby granted and enfeoffed, with their rights, members, and appurtenances, unto the said G. H. and his heirs for ever; NEVERTHELESS, To the use of such person or persons, for such estate or estates, interest or interests, and to and for such intents and purposes, and subject to such powers, provisoos, declarations, and agreements, and in such manner and form as the said G. H. by any deed or deeds, with or without power of revocation and new appointment, to be by him duly executed, shall from time to time or at any time direct, limit, or appoint; and in default of, and until such direction, limitation, or appointment, and as to such part and parts of the premises, of which there shall be no such direction, limitation, or appointment, or to which no such direction, limitation, or appointment shall extend; [To the

⁷ [Where the purchaser has not a wife living to whom he was married, on or before the 1st January 1834, the part in brackets may be omitted; in which case, of course, M. N., the dower trustee would not be a party to the deed. But the preceding limitation to such uses as the purchaser shall appoint, (though originally adopted as part of the dower uses,) should be retained in every case; because it enables him on a re-sale to defeat judgments against himself, of

use of the said G. H. and his assigns during the term of his natural life, without impeachment of waste; and [*110] from and after the *determination of that estate by any means in his lifetime, To the use of the said M. N. and his heirs, during the life of the said G. H., In trust, nevertheless, for the said G. H. and his assigns; and from and after the determination of the estate, so limited in use to the said M. N. and his heirs, during the life of the said G. H.], To the use of the said G. H., his heirs and assigns for ever. ⁸And the said G. H. doth hereby declare, that no widow whom he may happen to leave, shall be entitled to dower out of the messuages or tenements and hereditaments hereinbefore described, and expressed to be hereby granted and enfeoffed, or any part thereof.

AND the said mayor, aldermen, and burgesses, do hereby for themselves and their successors, covenant, promise, and agree to and with the said G. H., his appointees, heirs, and assigns, in manner following, (that is to say,) That (for and notwithstanding any act, deed, matter, or thing, by them the said mayor, aldermen, and burgesses, or their predecessors, heretofore made, done, permitted, or suffered to the contrary) they the said mayor, aldermen, and burgesses now at the time of the sealing and delivery of these presents are lawfully, rightfully, and absolutely seised of the said messuages [*111] or tenements and hereditaments *hereinbefore described and expressed to be hereby granted and enfeoffed for an indefeasible estate of inheritance in fee-simple in possession; AND that (for and notwithstanding any act, deed, matter, or thing as aforesaid) the said mayor, aldermen, and burgesses now at the time of the sealing and delivery of these presents, have good right, full power, and lawful and absolute authority to grant, alien, enfeoff, and confirm the said messuages or tene-

which the purchaser from him has no notice; (see ante, vol. i. p. 162, in note); and also because an appointment under this power will alone carry the legal estate, and thus save the expense of the lease for a year, or the lease for a year stamp. See the case of *Moreton v. Lees*, cited ante, vol. i. p. 170, in note.]

⁸ [This declaration should be inserted in every case, when it is intended that dower shall not attach, as the old dower uses will not bar the dower of any wife married subsequently to the 1st January 1834. See 3 & 4 Will. 4, c. 105, ss. 2 & 14.]

ments and hereditaments with the appurtenances, unto the said G. H. and his heirs, in manner aforesaid, and according to the true intent and meaning of these presents; AND FURTHER, That it shall and may be lawful for the said G. H., his appointees, heirs, and assigns, from time to time, and at all times hereafter, peaceably and quietly to enter into and upon, and to have, hold, use, occupy, possess, and enjoy the said messuages or tenements and hereditaments, and to receive and take the rents, issues, and profits thereof, and of every part thereof, to and for his and their own use and benefit absolutely, without any interruption or disturbance whatsoever, of, from, or by the said mayor, aldermen, and burgesses, or their successors, or any person or persons lawfully or equitably claiming, or to claim, by, from, through, under, or in trust for the said mayor, aldermen, and burgesses, or their successors or predecessors; AND that free and clear, and freely, clearly, and absolutely acquitted, exonerated, and discharged, or otherwise by the said mayor, aldermen, and burgesses, or their successors, well and sufficiently *saved, defended, [*112] kept harmless and indemnified of, from, and against all and all manner of former and other gifts, grants, bargains, sales, leases, mortgages, estates, titles, troubles, charges, and incumbrances whatsoever had, made, done, committed, or suffered by the said mayor, aldermen, and burgesses or their predecessors, or any person or persons lawfully or equitably claiming, or to claim, by, from, through, under, or in trust for them the said mayor, aldermen, and burgesses, or their predecessors.

AND MOREOVER, That they the said mayor, aldermen, and burgesses, and their successors, and every person having, or lawfully or equitably claiming, or who shall or may have, or lawfully or equitably claim any estate, right, title, trust, or interest in, to, or out of the said messuages or tenements and hereditaments hereinbefore described, and expressed to be hereby granted and enfeoffed, or any of them, by, from, through, under, or in trust for the said mayor, aldermen, and burgesses, or their successors or predecessors, shall and will from time

to time, and at all times hereafter, upon every reasonable request, and at the proper costs and charges of the said G. H., his appointees, heirs, or assigns, make, do, acknowledge, and execute, or cause and procure to be made, done, acknowledged, and executed, all such further and other lawful and reasonable acts, deeds, matters, and things, conveyances, and assurances in the law, for [¶113] the further, better, more *perfectly and absolutely granting, conveying, and assuring the same messuages or tenements and hereditaments, and every part thereof, with the appurtenances, unto and to the use of the said G. H., his appointees, heirs, and assigns, or otherwise as he or they shall direct or appoint, as by the said G. H., his appointees, heirs, or assigns, or his or their counsel in the law, shall be reasonably advised or devised and required.

AND the said mayor, aldermen, and burgesses have nominated, constituted, and appointed, and by these presents do nominate, constitute, and appoint the said T. Y. the true and lawful attorney of and for the said mayor, aldermen, and burgesses, and in their name and stead to enter into, and take full, quiet, and peaceable possession and seisin of, all and singular the said messuages or tenements and hereditaments, or of some part thereof, in the name of the whole, and then to deliver full, quiet, and peaceable possession and seisin of all and singular the same hereditaments, or some part thereof, in the name of the whole, unto the said G. H., or to the said M. N., his attorney hereinafter in that behalf lawfully authorised, according to the form and effect and the true intent and meaning of these presents.

AND the said G. H. hath nominated, constituted, and appointed, and by these presents doth nominate, constitute, and appoint, the said M. N. the true and lawful attorney of and for him the said *G. H., and in [¶114] his name and stead to enter into and upon the said messuages or tenements and hereditaments, or some part thereof, in the name of the whole, and then to receive and take of and from the said mayor, aldermen, and burgesses, or their said attorney, full, peaceable, and quiet possession and seisin of all and singular the said

hereditaments, or of some part thereof, in the name of the whole: and such possession and seisin so taken, To HOLD to the uses aforesaid, according to the form and effect, and the true intent and meaning of these presents. In witness, &c.

*G R A N T.

[*115]

GRANT of a RENT-CHARGE during the Life of the Grantor, with a DEMISE to a Trustee for Years for securing the same.

THIS Indenture, made the day of in the year of our Lord, &c., Between Andrew Ashton of in the county of Middlesex, Esquire, of the first part, Benjamin Barton of of the second part, and Charles Cary of of the third part: WHEREAS William Ashton, late of deceased, in and by his last will and testament in writing, duly executed and attested, bearing date on or about the day of in the year did (amongst other things) give and devise all and every his freehold messuages, lands, tenements, and hereditaments, situate, lying, and being in the several parishes of and elsewhere, in the county of with the appurtenances, to the said Andrew Ashton and his assigns during the term of his natural life, without impeachment of waste, with divers remainders over; and the said testator thereby *appointed Robert Richards, Es-
[*116] quire, sole executor of his said will, who, on or about the twenty-second day of February, One thousand seven hundred and Eighty-nine, duly proved the same in the Prerogative Court of Canterbury; AND WHEREAS the said Benjamin Barton hath contracted with the said Andrew Ashton for the absolute purchase of one clear annuity, or annual sum of £ , to be paid unto

the said Benjamin Barton, his executors, administrators, and assigns, during the life of the said Andrew Ashton, free from taxes, and without any other deduction whatsoever, by equal quarterly payments on the days hereinafter mentioned ; together with a proportional part of the said annuity for the time, which at the decease of the said Andrew Ashton shall have elapsed of the quarterly payment thereof then growing due, and subject to the agreement hereinafter contained for the re-purchase of the said annuity, at or for the price or sum of £ ; AND WHEREAS, for securing the payment of the said annuity or clear yearly sum of £ , the said Andrew Ashton hath by a certain warrant of attorney, bearing even date with these presents, authorised and gentlemen, two attorneys of her Majesty's court of at Westminster, to confess judgment against him in the said court of at the suit of the said Benjamin Barton in an action of debt for the sum of £ , and costs of suit : AND WHEREAS it was agreed, upon the treaty for [*117] the *purchase of the said annuity, that for the further, better, and more effectually securing unto the said Benjamin Barton, his executors, administrators, and assigns, payment of the said annuity or clear yearly sum of £ , the same should be charged upon, and be issuing and payable out of all those the said messuages, lands, tenements, and hereditaments, late of the said testator, William Ashton, situate, lying, and being in the said county of and so devised by his said will as aforesaid, with their and every of their rights, members, and appurtenances ; and that the same messuages, lands, tenements, and hereditaments should be demised to a trustee for a term of years, upon the trusts and in the manner hereinafter expressed and declared of and concerning the same : AND WHEREAS it was agreed upon the treaty for the purchase of the said annuity or yearly sum of £ , that the costs and expenses attending the contract for the said annuity, and of preparing and executing the several instruments for securing the same, and of enrolling a memorial of such securities, should be borne and paid by the said

Andrew Ashton; Now THIS INDENTURE WITNESSETH, That in pursuance of the said recited agreement, and in consideration of the sum of £ , of lawful money of Great Britain, to the said Andrew Ashton, in notes of the Governor and Company of the Bank of England, payable to bearer on demand, in hand, well and truly paid by the said Benjamin Barton, at or before the sealing and delivery of *these presents, the receipt⁹ and [*118] payment of which said sum of £ , he the said Andrew Ashton doth hereby acknowledge, and from the same and every part thereof doth acquit, release, and discharge the said Benjamin Barton, his heirs, executors, administrators, and assigns, and every of them, for ever by these presents, He the said Andrew Ashton Hath given, granted, and confirmed, and by these presents Doth give, grant, and confirm unto the said Benjamin Barton, his executors, administrators,¹ and assigns,

⁹ Beside the general receipt expressed in the body of the deed, it is usual to indorse a particular one; but this practice is of a modern date. See 2 Atk. 478; 3 Atk. 112. It is a rule of equity, that from the time of the contract the vendor is considered, as to the estate, a trustee for the purchaser; and the vendee as to the money, a trustee for the vendor; see Green v. Smith, 1 Atk. 573, Pollexfen v. Moor, 3 Atk. 273, note 2, [i. e. supposing the vendor has a good title; 16 Ves. 614.] Although a receipt for the purchase-money be signed, yet if the money be not actually paid, a court of equity will give relief. See Ryle v. Haggie, 1 Jac. & Walker, 234. [Winter v. Lord Anson, 3 Russ. 488.]

¹ Before the Statute of Frauds (29 Car. 2, c. 3,) if a rent had been granted to A., his *executors* and *administrators*, during the life of B., and A. had afterwards died during the life of B., the executor or administrator should not have been a special occupant. 16 Vin. 71, pl. 5, 73, pl. 3, (G.) Buller v. Cheverton. But the 12th section of the act enacts, "That from henceforth any estate *per autre vie* shall be devisable by a will in writing, signed by the party so devising the same, or by some other person in his presence, and by his express directions, attested and subscribed in the presence of the devisor by three or more witnesses; and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent, as in case of lands in fee-simple; and in case there be no special occupant thereof, it shall go to the *executors* or *administrators* of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands." Since this statute, the executor or administrator may be a special occupant of a rent; (i. e. *quasi* special occupant; for in the nature of things there cannot be an actual occupant of rent. See Lord Eldon's argument in Ripley v. Waterworth, 7 Ves. 425.) The point, as to the special occupancy, can now scarcely arise. In every modern grant of an annuity, there is a covenant to pay the annuity to the annuitant, his *executors* or *administrators*, with the usual powers of enforcing payment by entry and distress, and with a term of years for further securing it; so that if the rent should determine as rent, it would be still payable as an annual sum under the covenant and term of years, and might, I apprehend, be distrained for as such. See Allerton v. Eden, Noy, 5. 6 Vin. 393, pl. 11. Moor, 179, pl. 318, 185, pl. 331. See also Rawlinson v. Montague, cited note D. 3 P. W. 264. [Bearpark v. Hutchinson, 7 Bing. 178.]

[*119] for and *during the natural life of him the said Andrew Ashton, one annuity, or clear yearly rent of £ of lawful money of Great Britain, to be [*120] *yearly issuing, payable, going, had, received, and taken by him the said Benjamin Barton, his executors, administrators, and assigns, out of, and to be charged and chargeable upon, all those the said freehold messuages, lands, tenements, and hereditaments, late of the said testator, William Ashton, situate, lying, and being in the several parishes of and each and every of them, and elsewhere in the said county of with their and every of their rights, members, and appurtenances, and out of all other the messuages, lands, tenements, and hereditaments, in the county of by the said will devised as aforesaid, or whereof or whereto he the said Andrew Ashton is under and by virtue of the said in part recited will, or otherwise, seised, possessed, or entitled for any estate or interest whatsoever; together with all and singular the rights, members, and appurtenances thereto belonging, or in anywise appertaining, and the remainder and remainders, yearly and [*121] other rents, issues, and profits of *all and singular the premises : To HAVE, HOLD, RECEIVE, TAKE, AND

By the statute 14 Geo. 2, c. 20, s. 8, it is enacted, "That estates *per autre vie*, in case there shall be no special occupant thereof, of which no devise shall have been made according to the said act for prevention of frauds and perjuries, or so much thereof as shall not have been so devised, shall go, be applied, and be distributed, in the same manner as the personal estate of the testator or intestate." An estate *per autre vie*, when limited to the *executors*, must be considered as *personal estate*, (see *Williams v. Jekyll*, 2 Ves. 681, 683, 684, 4 Term Rep. 230, *Ripley v. Waterworth*, 7 Ves. 425, *Milner v. Harewood*, 18 Ves. 273,) and that for all purposes; for in *Williams v. Jekyll*, Lord Hardwicke, (2 Ves. 681,) considered it as a chattel for the purpose of construction. See Lord Redesdale's argument in *Campbell v. Sandys' case*, 1 Schoal. 291. [In the case of *Taylor v. Martindale*, 5 Jur. 648, the Vice-Chancellor of England held, that under a bequest of an annuity to one "for ever," the annuity passed to the executors, and not to the heirs, of the annuitant.] It would follow, that this kind of property, although freehold, would not, for mere intention, pass by a general devise of *real estate*, although it is to be conveyed as a freehold estate. And it [could previously to the stat. 7 Will. 4 and 1 Vic. c. 26] only be devised by a will attested by three witnesses. Per Lord Eldon in *Ripley v. Waterworth*, 7 Ves. 451. See Irish Chan. Rep. 290, per Lord Redesdale. However, an estate *per autre vie*, when made to the grantee and his heirs, is liable to debts by specialty, and is within the Statute of Fraudulent Devises, 3 & 4 William & Mary, c. 14. *Westfaling v. Westfaling*, 3 Atk. 460. [See also *Atkinson v. Baker*, 4 T. R., 229. *Doe v. Robinson*, 8 Barn. & Cress. 296. *Doe v. Lewis*, 9 Mee. & Weis. 662.]

ENJOY the said annuity, clear yearly rent, or annual sum of £ and every part thereof, unto the said Benjamin Barton, his executors, administrators, and assigns, for and during the natural life of the said Andrew Ashton, to be paid and payable to him the said Benjamin Barton, his executors, administrators, or assigns, at or in the common dining-hall in Lincoln's Inn, in the said county of Middlesex, by equal quarterly payments, between the hours of ten and twelve of the clock in the forenoon of the several and respective days following, (that is to say)

in each and every year, by even and equal portions, free from taxes, and without any other deduction whatsoever; together with a proportional part of the said annuity, or clear yearly sum of £ for the time, which at the decease of the said Andrew Ashton shall have elapsed of the quarterly payment thereof, then growing due; the first payment of the said annuity to begin and be made on the day of next ensuing the date of these presents. PROVIDED ALWAYS, and it is hereby declared and agreed by and between the said parties hereto, and particularly the said Andrew Ashton, for himself, his heirs, executors, and administrators, doth hereby grant, covenant, and agree to and with the said Benjamin Barton, his executors, administrators, and assigns, that in case the said annuity, or yearly rent of £ , or any part thereof shall happen to be behind and unpaid by *the space of fourteen days next [*122] over or after any of the said days or times hereby appointed for the payment thereof, and whereon the same ought to be paid as aforesaid, then and in every such case, and so often as it shall so happen, it shall and may be lawful for the said Benjamin Barton, his executors, administrators, and assigns, into and upon the said messuages, tenements, lands, hereditaments, and premises so charged with the payment of the said annuity, or yearly rent of £ , or intended so to be as aforesaid, or into and upon any part thereof, to enter and distrain for the same annuity, or yearly rent of £ , and all arrears thereof; and the distress and distresses then and there found and taken to take, lead, drive, carry away,

and impound, and the same in pound to detain and keep, until the same annuity, or yearly rent of £ , and all arrears thereof, and all costs, charges, and expenses whatsoever, sustained, or occasioned by, or attending the making, taking, and keeping any such distress or distresses shall be fully paid and satisfied; and in default of payment thereof, or of any part thereof, in due time after any such distress or distresses shall be made and taken, to appraise, sell, or dispose of such distress or distresses, or any part thereof, or otherwise to act therein according to the due course of law in like manner, as in cases of distress taken for non-payment of rent reserved upon common leases; To the intent, that thereby and therewith the said Benjamin Barton, his executors, ad-
[*123] ministrators, *and assigns, shall and may be fully paid and satisfied the said annuity or yearly rent of £ , and all arrears thereof, or so much thereof as shall then be remaining due and unpaid, and all costs, charges, and expenses which shall be sustained or occasioned by the non-payment thereof. PROVIDED ALSO, and he the said Andrew Ashton, for himself, his heirs, executors, and administrators, doth hereby further covenant, grant, and agree to and with the said Benjamin Barton, his executors, administrators, and assigns, that in case the said annuity or yearly rent of £ , or any part thereof, shall at any time or times happen to be behind and unpaid by the space of twenty-eight days next over or after, any of the said days or times appointed for the payment thereof as aforesaid, then and in such case, and so often as it shall happen (although no formal or lawful demand thereof shall be made), it shall and may be lawful for the said Benjamin Barton, his executors, administrators and assigns, into and upon all the said messuages, or tenements, lands, hereditaments, and premises hereby charged therewith as aforesaid, or into and upon any part thereof in the name of the whole, to enter, and the same to have, hold, and enjoy, and the rents, issues, and profits thereof, and of every part thereof, to receive and take to and for his and their own use and benefit, until he or they shall be thereby, or therewith, or otherwise fully paid and satisfied the said annuity, or yearly

rent of £ , and all arrears thereof, and also so much *of the said annuity, or yearly rent of [*124] £ as shall incur and grow due during such time as the said Benjamin Barton, his executors, administrators, or assigns, shall continue in possession of the said hereditaments and premises after such entry as aforesaid, and also all such loss, costs, charges, damages, and expenses, as shall be sustained or occasioned by reason or means of the non-payment of the said annuity or yearly rent-charge, or any part thereof, at or on the days or times hereinbefore appointed for the payment thereof (such possession, when taken, to be without impeachment of waste). And the said Andrew Ashton, for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree to and with the said Benjamin Barton, his executors, administrators, and assigns, that he the said Andrew Ashton shall and will well and truly pay, or cause to be paid, unto the said Benjamin Barton, his executors, administrators, or assigns, during the natural life of him the said *Andrew Ashton, the said annuity or yearly rent [*125] of £ , free from taxes, and without any other deduction whatsoever, at the place, or times, and in manner and form hereinbefore expressed and appointed for the payment thereof, according to the true intent

* The covenant, or proviso, enabling the grantee to *enter* and *hold* the land until the arrears be satisfied, creates an interest, which enables him to recover the possession in *ejectment*. It was formerly holden, that, in such case, an actual entry was necessary in order to support an *ejectment*; but it was settled previously to the statute 4 Geo. 2, c. 28, that the general confession was sufficient, without the proof of an actual entry. See *Gilb. Ejectment*, 20, 21, ed. 1781.

It is generally true, that no person can take advantage of a condition of entry, [for non-payment of rent,] unless there be a previous demand of the rent, or unless it be expressly stipulated to the contrary. *Co. Litt. 201, b. 5 Co. 40, b. 1 Roll. Ab. 469.*

* Upon the grant of a rent-charge the grantee has the choice of one of two remedies for the recovery of it, when in arrear; by distress, and by writ of annuity; but he cannot make use of both of them at the same time. *Litt. sec. 219.* This double provision, however, does not extend to rents *reserved* to the grantor, nor to rents created by will, or granted for equality of partition, or in lieu of dower. *Co. Litt. 144, a. b. 145, a. 1 Roll. Ab. 226. 6 Co. 58, b.* So if a man grant, that if A. be not paid a certain yearly sum, he may distrain for it in the manor of D.; this a good rent-charge, and yet a writ of annuity will not lie for the recovery of it. *Litt. s. 221.* [If the grantee of a rent-charge purchase part of the land out of which the rent issues, or has part of the land devised to him, the entire rent-charge is extinguished. *Litt. s. 222. Dennett v. Pass, 1 Bing. N. C. 388.]*

and meaning of these presents; and also that the heirs, executors, or administrators of the said Andrew Ashton, shall and will, within ten days next after the decease of the said Andrew Ashton, well and truly pay, or cause to be paid, unto the said Benjamin Barton, his executors, administrators, or assigns, a proportional part of the same annuity, yearly rent, or annual sum of £ for the time, which, at the decease of the said Andrew Ashton, shall have elapsed, of the quarterly payment thereof, [*126] then growing due.⁴ *AND THIS INDENTURE FURTHER WITNESSETH, that in further pursuance of the said agreement, and for the consideration hereinbefore expressed, and for the further, better, and more effectually securing the *payment of the said annuity, [*127] yearly rent, or annual sum of £ , at or on the days or times and in the manner aforesaid, and also

⁴ The grantor covenants for himself, his heirs, executors, and administrators, not only to pay the annuity, or rent-charge, when it shall become due, but also a proportional part of it for the time which shall elapse between the last quarterly day of payment next preceding the death of the grantor and the day of his decease. This provision is necessary; for if the grantor die before the day of payment, the annuity and rent-charge are determined; and equity will not make any apportionment of it in favour of the grantee. *Pearly v. Smith*, 3 Atk. 261. The payment of an annuity or rent is similar in this case to the application of dividends arising upon money in the public funds, payable to one for life; in which case, if the person to whom they are made payable should die before the day of payment, they cannot be apportioned. *Vide Rashleigh v. Masters*, 3 B. C. C. 99, 101. *Wilson v. Harman*, 2 Ves. 672. Amb. 279.

By the common law, if tenant for life, had made a lease for years, which determined by his death, and had died before the rent was due, the rent was lost, both to the executors and those in remainder or reversion. *Vide 2 P. W. 502. 1 P. W. 392.* But the statute 11 Geo. 2, c. 19, s. 15, gives an action on the case to the executors and administrators of the tenant for life to recover from the under-tenants such proportional part of the rent as shall be incurred from the last day of payment to the decease of the tenant for life. In the case of *Paget v. Gee*, (Amb. Rep. 198,) it was said, that by an equitable construction, the above statute extended to leases for years made by tenants in tail, not warranted by the statute 32 Hen. 8, c. 28, and also to leases for years made by tenants for years determinable on their own lives. But see *Vernon v. Vernon*, 2 Bro. Cha. C. 659. So as to compositions for tithes. *Aynsley v. Wordsworth*, 2 Ves. & B. 331. The statute does not extend to leases made in exercise of a power. See *Strafford v. Wentworth*, Prec. Cha. 557, and the case *Ex parte Smyth*, 1 Swanst. 337, where the subject of appointment is very fully stated and commented. [By the act 4 & 5 Will. 4, c. 22, the provisions of the act of 11 Geo. 2, are extended to every case in which the interests of tenants determine on the death of the person by whom such interests have been created, and on the death of any life or lives for which such person was entitled to the lands demised. By the second section of this act all rents, annuities and other payments becoming due at fixed periods, are to be apportioned between the parties entitled thereto in succession. This provision does not, of course, apply to any case where the entire periodical payment has not actually accrued. That the act does not apply to rents which are not reserved by an instrument in writing, see *In re Markby*, 4 My. & Cr. 484.]

in consideration of the sum of ten shillings of lawful money of Great Britain to the said Andrew Ashton in hand paid by the said Charles Cary, at or before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged,) he the said Andrew Ashton, at the request, and on the nomination of the said Benjamin Barton (testified by his being a party to, and sealing and delivering these presents,) hath granted, bargained, sold, and demised, and by these presents doth grant, bargain, sell, and demise unto the said Charles Cary, his executors, administrators, and assigns, all those the said several messuages or tenements, lands, hereditaments, and premises, with the appurtenances, hereinbefore mentioned, and hereinbefore charged with the payment of the said annuity, yearly rent, or annual sum of £ , and all other the estates and hereditaments situate and being in the said county of , which he the said Andrew Ashton is under and by the virtue of the said hereinbefore in part recited will or otherwise seised or possessed *of, or entitled to, for any estate of inheritance, or for his life, or for any term or number [*128] of years, or otherwise howsoever; together with all and singular the rights, members, and appurtenances thereto respectively belonging, or in any wise appertaining; and the reversion and reversions, remainder and remainders, rents, issues, and profits of all and singular the said several hereditaments, and premises; To have and to hold the said messuages or tenements, lands, hereditaments, and premises hereby granted and demised, or expressed, or intended so to be, with the appurtenances, unto the said Charles Cary, his executors, administrators, and assigns, from the day next before the day of the date of these presents, for and during the term of ninety-nine years thence next ensuing, if he the said Andrew Ashton shall so long live, without impeachment of waste; yielding and paying therefor yearly and every year, during the continuance of this demise, unto him the said Andrew Ashton the rent of one peppercorn (if the same shall be lawfully demanded;) nevertheless, upon and for the trusts, intents, and purposes hereinafter expressed and declared of and concerning the same hereby demised premises,

(that is to say :) Upon trust in the first place, to permit and suffer the said Andrew Ashton, and his assigns, to receive and take the yearly income, or the rents, issues, and profits of all the said hereby demised premises, with the appurtenances, or to have, hold, occupy, and enjoy the same, until default shall happen to [*129] *be made of or in payment of the said annuity or yearly rent of £ , or some part thereof, at or on the days or times, and in the manner hereinbefore appointed for payment thereof; and upon this further trust, that in case the said annuity or yearly rent of £ , or any part thereof, shall happen to be behind or unpaid by the space of thirty days next over or after any of the said days or times hereinbefore appointed for payment of the same, and whereon the same ought to be paid as aforesaid, then and so often, the said Charles Cary, his executors, administrators, or assigns, shall and do, from time to time, by and out of the annual rents, issues, and profits of the said messuages or tenements, hereditaments and premises, or any part thereof, or by demising, leasing, mortgaging, or selling the same hereditaments, or any part thereof, for all or any part of the said term of ninety-nine years therein, or by such other ways or means as to him the said Charles Cary, his executors, administrators, or assigns, shall seem meet, raise and levy such sum and sums of money as shall be sufficient to pay and satisfy the said annuity or yearly rent of £ , or so much thereof as shall from time to time happen to be in arrear and unpaid; together with all such loss, costs, charges, damages, and expenses whatsoever, as the said Charles Cary and Benjamin Barton, or either of them, their or either of their executors, administrators, or assigns, shall sustain, expend, or be put unto, for or by reason or means [*130] of the non-payment of *the same annuity or yearly rent of £ , or any part thereof, at the days and times, and in the manner hereinbefore appointed for payment thereof, and as the said Charles Cary, his executors, administrators, or assigns shall sustain or be put unto in and about the execution and performance of the trusts hereby declared; and shall and do pay and apply

the moneys arising thereby, or therefrom, in or towards payment and satisfaction thereof accordingly; and shall and do pay to, or otherwise permit and suffer the said Andrew Ashton, and his assigns, to have, receive, and take the surplus of the said rents, issues, and profits of the said messuages or tenements, lands, hereditaments, and premises, after full payment and satisfaction of the said annuity or yearly rent of £ and all arrears thereof, and all such costs, charges, damages, and expenses as aforesaid, to and for his and their own use and benefit. AND it is hereby agreed and declared, between and by the said parties hereto, that the receipt or receipts of the said Charles Cary, his executors, administrators, or assigns, shall be a sufficient discharge for any moneys which shall come to his or their hands, by virtue of or under these presents, or upon the trusts aforesaid, unto the person or persons paying the same moneys, or for so much thereof as in such receipt or receipts shall be expressed to be received: and that the person or persons paying such moneys, shall not, after obtaining such receipt or receipts for the same as aforesaid, be bound or obliged to see to the application *of the same [*131] moneys, nor be answerable for the loss, misapplication or non-application thereof; nor shall he or they be bound to ascertain or inquire into the necessity or propriety of any sale, mortgage, or other disposition, or the collection of rents and profits which shall be made by the said Charles Cary, his executors, administrators, or assigns. And the said Andrew Ashton, for himself, his heirs, executors, and administrators, doth covenant, promise, and agree to and with the said Benjamin Barton, his executors, administrators, and assigns, and also separately to and with the said Charles Cary, his executors, administrators, and assigns, by these presents in manner and form following; (that is to say,) that he the said Andrew Ashton hath in himself good right, full power, and lawful and absolute authority to charge the said messuages or tenements, lands, hereditaments, and premises, and every part or parcel thereof, with the payment of the said annuity, yearly rent, or annual sum of £ in manner aforesaid; and to demise the same

messuages or tenements, lands, hereditaments, and premises respectively to the said Charles Cary, his executors, administrators, and assigns, for and during the said term of ninety-nine years,⁵ (determinable as aforesaid,) upon and for the trusts, intents, and purposes hereinbefore mentioned, expressed, and declared of and concerning [*132] the same, and according to the true intent and meaning of these presents; and further, that all and singular the premises hereby demised now are and shall from time to time, and at all times hereafter, during the continuance of the said term of ninety-nine years, remain, continue, and be open to, and sufficient for, such distress and entries as aforesaid, of the said Benjamin Barton, his executors, administrators, and assigns, in case of non-payment to him or them of the said annuity, yearly rent, or annual sum of £ at the days or times, and in manner aforesaid; and that the said messuages or tenements, lands, hereditaments, and premises now are free and clear, and freely and clearly acquitted, exonerated, and discharged, and shall remain, continue, and be, during the said term hereby granted, well and sufficiently saved, defended, kept harmless, and indemnified by the said Andrew Ashton, his heirs, executors, or administrators, of, from, and against all and all manner of former and other estates, titles, troubles, charges, and incumbrances whatsoever, had, made, done, committed, executed, occasioned, or suffered, or to be had, made, done, committed, occasioned, or suffered by the said Andrew Ashton, or any other person or persons whomsoever.⁶ And moreover, that he the said Andrew Ashton, and every other person having, or lawfully or [*133] equitably claiming, or who shall or may have, or lawfully or equitably claim any estate, right, title, trust, or interest whatsoever, in, to, or out of the said messuages or tenements, lands, hereditaments, and premises hereinbefore mentioned and hereby demised, or intended so to be, or any of them, or any part thereof,

⁵ See as to an action upon a covenant of this kind, Bradshaw's case, 9 Co. 60, b. Cro. Jac. 304.

⁶ For acts which do, or do not, amount to a breach of the covenant against prior incumbrances, see Hamington & Rydear's case, 1 Leon. 92. 1 Keb. 427. Dyer, 139, a. Ander. 236. 2 Vern. 45.

shall and will, from time to time, and at all times⁷ during the life of him the said Andrew Ashton, upon every reasonable request⁸ of the said Benjamin Barton, his executors, administrators, or assigns, but at the proper costs and charges⁹ in the law of the said Andrew Ashton, make, do, acknowledge, and execute, or cause or procure to be made, done, acknowledged, and executed, all such further and other lawful and reasonable acts, deeds, and things, conveyances, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely granting and securing the said annuity or yearly rent of £ to the said Benjamin Barton, his executors, administrators, and assigns, by and out of the premises, and every part thereof, for and during the continuance of the natural life of him the said [*134]
 *Andrew Ashton, and also for the more effectually granting, demising, and assuring the same premises unto the said Charles Cary, his executors, administrators, and assigns, for and during all the then remainder of the said term of ninety-nine years, determinable as aforesaid, upon the trusts hereinbefore declared thereof, as by the said Benjamin Barton, his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably devised, or advised, and required.
 AND WHEREAS the judgment so to be confessed by the said in her Majesty's court of for the said sum of £ , and costs of suit as aforesaid, It is agreed shall be entered of record in the said court of as of term now last past, or of some subsequent term;¹ Now THIS INDENTURE FURTHER WIT-

⁷ See 1 Roll. Ab. 441.

⁸ Ibid. 441. Styles, 242. T. Jones, 195.

⁹ It should seem that the further assurance must be at the costs of the persons to whom the conveyance is made, unless it be provided to the contrary. See 1 Buls. 90. And in Heron v. Treyne, 2 L. Ray. 750, it was said, that in a covenant to make further assurance at the costs of B., notice of the kind of assurance must be given to him before he ought to tender the costs; but otherwise, if the covenant be to make a particular conveyance.

¹ [Under the act 3 Geo. 4, c. 39, ss. 1, 2, the warrant of attorney given by the grantor would, in case he became bankrupt, be invalid as against his assignees, unless it were filed, or judgment signed upon it within twenty-one days after its date. See Everett v. Wells, 2 Man. & Gra. 269. And by the acts 1 & 2 Vic. c. 110, and 2 & 3 Vic. c. 11, the judgment will not affect the lands of the grantor as against purchasers, mortgagees, or creditors, unless and until a memorandum or minute thereof be entered in the Court of Common Pleas.]

NESSETH, and it is hereby agreed and declared between and by the said Andrew Ashton and Benjamin Barton, that the said judgment is intended to be so entered up as aforesaid, and the said Benjamin Barton, his executors, administrators, and assigns, shall stand and be possessed thereof, and of all benefit and advantage arising, and to be had [*135] and taken *thereby as a collateral security only, and for the better and more effectually securing the payment of the said annuity, yearly rent, or annual sum of £ , to the said Benjamin Barton, his executors, administrators, and assigns, during the life of the said Andrew Ashton, at the several days or times, and in the manner hereinbefore appointed for payment thereof, and such proportional part thereof as aforesaid ; and that no execution shall be issued or taken out upon the said judgment, unless and until some payment of the said annuity, or some part thereof, shall be in arrear for the space of twenty-one days next after some or one of the said days hereinbefore appointed for the payment thereof, as aforesaid : Provided always, and it is hereby further agreed and declared between and by the said parties to these presents, that when and so often as the said annuity, yearly rent, or annual sum of £ , or some part thereof, shall be behind and unpaid by the space of twenty-one days next over or after any of the said days of payment hereinbefore mentioned, then and in such case, and so often as it shall so happen, it shall and may be lawful for the said Benjamin Barton, his executors, administrators, or assigns, to sue out such execution or executions upon or by virtue of the said judgment, as he or they shall think fit, or be advised, for the recovery of the said arrears of the said annuity, yearly rent, or annual sum of £ , and all costs and charges, which he the said Benjamin Barton, his [*136] executors, *administrators, or assigns, or any of them, shall bear, pay, sustain, or be put unto, for or by reason or means of the non-payment of the same, or any part thereof; and that it shall not be necessary for the said Benjamin Barton, his executors, administrators, or assigns, to revive, or cause the said judgment to be revived, or to do any act, matter, or thing to keep

the same on foot, notwithstanding the same judgment shall have been entered of record for the space of one year, or upwards; and notwithstanding any rule or practice of the said court, in which the said judgment shall be entered on record, to the contrary; and that he the said Andrew Ashton, his heirs, executors, or administrators, shall not, nor will have, take, or receive, or attempt by any ways or means to have, take, or receive any advantage for want of reviving or keeping the said judgment on foot: Nevertheless it is hereby agreed and declared, that after the decease of the said Andrew Ashton, and full payment of the said annuity, yearly rent, or annual sum of £ , and all arrears thereof, together with such proportional part thereof as aforesaid, up to the day of the decease of him the said Andrew Ashton, and of all such costs, charges, damages, and expenses as aforesaid, the said Benjamin Barton, his executors, administrators, or assigns, shall and will, at the request, costs, and charges of the heirs, executors, or administrators of the said Andrew Ashton, acknowledge satisfaction of the said judgment on the record thereof in due form of law, or do any further or other reasonable act, matter, or thing that may be then required in regard thereto; so that for the doing thereof he the said Benjamin Barton, his executors, administrators, or assigns, be not compelled nor compellable to travel from his or their place or places of abode. Provided always, and it is hereby agreed and declared between and by the said parties hereto, and particularly the said Benjamin Barton, for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree to and with the said Andrew Ashton, that in case the said Andrew Ashton shall at any time hereafter be minded or desirous of re-purchasing the said annuity, yearly rent, or annual sum of £ , and of such his mind or desire shall give unto the said Benjamin Barton, his executors, administrators, or assigns, or leave at his or their usual place of residence or abode, ten days' notice in writing, he the said Benjamin Barton, his exe-

* As to the efficacy of such a stipulation, see *Morris v. Jones*, 2 Barn. & Cress. 243. *Heath v. Brindley*, 2 Adol. & El. 368.]

cutors, administrators, or assigns, shall and will at the end of the said ten days, for which such notice shall be given as aforesaid, on receiving of and from the said Andrew Ashton all sums of money whatsoever, which shall be then due for, or on account of, the arrears of the said annuity, and also a proportional part thereof, from the last quarterly day of payment preceding such repurchase, up to, and inclusive of, the day of *repurchasing the same; and all costs, charges, and expenses which the said Benjamin Barton, his executors, administrators, or assigns, shall have incurred, or been put unto, on account of the non-payment of the said annuity, accept, receive, and take the sum of £ as and in full for the re-purchase of the said annuity, yearly rent, or annual sum of £ hereinbefore granted as aforesaid; and upon receipt of the said sum of £ , and of all arrears of the said annuity, and of such proportional part thereof as aforesaid, and of all such costs, charges, and expenses as aforesaid, he the said Benjamin Barton, his executors, administrators, or assigns, and also the said Charles Cary, his executors, administrators, or assigns, shall and will, at the request, and proper costs and charges in the law, of the said Andrew Ashton, make, do, and execute every act, deed, thing, assignment, or assurance, which shall be necessary or advisable for the releasing, assigning, vacating, and discharging as well the said annuity, or yearly rent of £ , as the said several securities given and executed for the payment thereof, as by the said Andrew Ashton, his executors, administrators, or assigns, or his or their counsel in the law, shall in that behalf be reasonably advised, or devised, and required; so that for the doing thereof he the said Benjamin Barton, his executors, administrators, or assigns, or the said Charles Cary, his executors, administrators, or assigns, be not compelled or compellable to [*139] go or travel from his or their *then usual place or places of abode.³ In witness, &c.

³ It has been repeatedly determined, that parol evidence cannot be admitted to prove that it was originally the agreement of the parties that the grantor should be at liberty to re-purchase the annuity. *Inrham v. Child*, 1 Bro. C. C. 92. *Portmore v. Morris*, 2 Bro. C. C. 219. *Hare v. Sherwood*, 3 Bro. C. C. 168. Clauses of re-purchase have therefore become very frequent in grants of annuities.

Grant of an Advowson.

*GRANT OF AN ADVOWSON.

THIS Indenture, made the day of in the year of our Lord, &c., between Abraham Auld of, &c., of the one part, and Benjamin Buxton of, &c., of the other part :

WHEREAS the said Abraham Auld hath contracted with the said Benjamin Buxton for the absolute sale to him of the advowson of the rectory of in the county of and the inheritance thereof in fee-simple, free from incumbrances, at or for the price or sum of £ .

NOW THIS INDENTURE WITNESSETH, that in pursuance of the said recited contract, and in consideration of the sum of £ of lawful money of Great Britain to the said Abraham Auld in hand paid by the said Benjamin Buxton, at or before the sealing and delivery of these presents, the receipt of which said sum of £ he the said Abraham Auld doth hereby acknowledge, and of and from the same, and every part thereof, doth acquit, *release, and discharge the said Benjamin Buxton, [*141] his heirs, executors, administrators, and assigns,

A clause of this kind, in the grant of an annuity, is introduced upon the same principle that a vendor of an estate in fee-simple stipulates with his vendee, that he may be at liberty within a given time, and for a certain price, to re-purchase the estate. See 1 Bridg. Con. 56. Amb. 19. An annuity, granted subject to a clause of re-purchase, differs from a mortgage or security for money in these points : in a mortgage the principal debt still continues, until the equity of redemption be foreclosed ; but upon the purchase of an annuity the principal is gone for ever, and consequently if the re-purchase be made, the money paid upon that occasion is not in discharge of a debt, but as the consideration for a new purchase. So a mortgage is the personal estate of the mortgagee, though it be made to him *in fee* ; but an annuity is considered as the real estate of the grantee, if it have a freehold quality. 2 Atk. 497. 1 Ves. 403.

However, as courts of equity lean very much against contracts of this kind, because they tend to obtain more than legal interest, they have been always anxious to find out reasons, applicable to the particular case, for construing sales of annuities as mere securities for money lent, and thereby to suffer a redemption, as in the common case of a mortgage. To use the words of Lord Hardwicke (3 Atk. 279), "There has been a long struggle between the equity of this court, and persons who have made it their endeavour to find out schemes to get exorbitant interest, and to evade the statutes of usury." In deciding therefore upon cases of this nature, the court has generally considered them in two points of view : first, Whether they ought to be reckoned (considering all the circumstances) as absolute sales, or merely as securities for money lent ? Secondly, Admitting them to be sales, whether there be any grounds to relieve against them ? See Lawley v. Hooper, 3 Atk. 278, and the cases cited in the note to the last edition. [See also *In re Naish*, 7 Bing. 150.]

and every of them for ever, by these presents, the said Abraham Auld hath granted and confirmed, and by these presents doth grant and confirm unto the said Benjamin Buxton, his heirs, and assigns, All that the advowson, donation, right of patronage, and presentation of, in, and to the rectory and parish church of in the county of , with all and singular the rights, members, and appurtenances thereto belonging, or in any wise appertaining; And the reversion and reversions, remainder and remainders thereof; And all the estate, right, title, interest, trust, property, claim, and demand whatsoever at law and in equity of the said Abraham Auld, in, to, or out of the same advowson, and every part thereof; And all deeds, evidences, and writings relating to, or in any wise concerning the said advowson now in the custody or power of the said Abraham Auld, or which he can obtain or procure without suit at law or in equity:

TO HAVE AND TO HOLD the said advowson and premises hereby granted, or intended so to be, with the appurtenances, unto the said Benjamin Buxton and his heirs, to the use of the said Benjamin Buxton, his heirs and assigns for ever.

And the said A. Auld doth hereby for himself, his heirs, executors, and administrators, covenant, promise, [*142] and agree to and with the said B. Buxton, *his heirs and assigns, in manner following; (that is to say,) That (for and notwithstanding any act, deed, matter, or thing by him the said A. Auld, at any time heretofore made, done, executed, permitted, or willingly or knowingly suffered to the contrary) he the said A. Auld now, at the time of the sealing and delivery of these presents, is lawfully, rightfully and absolutely seised of the said advowson and premises expressed to be hereby granted, with the appurtenances, for an absolute and indefeasible estate of inheritance, in fee-simple in possession;

And that (for and notwithstanding any such act, matter, or thing as aforesaid) he the said A. Auld, now, at the time of the sealing and delivery of these presents, hath in himself good right, full power, and lawful and

absolute authority to grant the said advowson and premises unto the said B. Buxton, his heirs and assigns, in manner aforesaid, and according to the true intent and meaning of these presents;

And also, that it shall be lawful for the said B. Buxton, his heirs and assigns, from time to time, and at all times hereafter, whenever the said church of _____ shall or may, by the death, resignation, deprivation, cession, or change of the rector or incumbent thereof for the time being, or otherwise, happen to become vacant, to present some proper and qualified clerk to succeed to the said church, as the rector or parson thereof, *and to do all [*143] other acts which appertain to the office of patron of the said rectory or church, without any let, suit, molestation, hindrance, interruption or disturbance of, from, or by the said A. Auld or his heirs, or any person or persons claiming, or to claim, by, from, through, or under him, them, or any of them;

And that free and clear, and freely, clearly, and absolutely acquitted, exonerated, and discharged, or otherwise by the said A. Auld, his heirs, executors, or administrators, or some or one of them, well and sufficiently saved, defended, kept harmless, and indemnified of, from, and against all and singular former and other gifts, grants, bargains, sales, mortgages, charges, and incumbrances whatsoever, had, made, done, executed, committed, or suffered by the said A. Auld, or any person or persons claiming, or to claim, by from, through, or under him;

And, moreover, that he the said A. Auld, and his heirs, and every other person having, or lawfully or equitably claiming, or who shall or may have, or lawfully or equitably claim, any estate, right, title, or interest in, to, or out of the said advowson and premises, expressed to be hereby granted, by, from, or under him or them, shall and will from time to time, and at all times hereafter, upon every reasonable request, and at the proper costs and charges of the said B. Buxton, his heirs or assigns, make, do, acknowledge, and *execute, or [*144] cause and procure to be made, done, acknowledged, and executed, all such further and other lawful and reasonable acts, deeds, matters, and things, convey-

ances, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely granting and assuring the same advowson and premises, with the appurtenances, unto, and to the use of, the said B. Buxton, his heirs and assigns, or otherwise, as he or they shall direct or appoint, as by the said B. Buxton, his heirs or assigns, or his or their counsel in the law, shall be reasonably advised or devised, and required; so that the person or persons, who shall be required to make and execute such further assurance or assurances, be not compelled nor compellable for the making or doing thereof, to go or travel from his, her, or their dwelling or respective dwellings, or usual place or places of residence or abode. In witness, &c.

[*145] *BARGAIN AND SALE,

BY TENANT IN TAIL IN POSSESSION TO A PURCHASER.⁴

THIS Indenture, made the 12th day of February, in the year of our Lord one thousand eight hundred and forty-two: Between Daniel Den, of Lincoln's Inn, in the county of Middlesex, Esquire, of the one part, and Edward East, of, &c. Esquire, a Bachelor, [or a Widower, as the case may be], of the other part: WHEREAS the [*146] said Daniel Den *is seised or entitled for an estate in tail male in possession, of or to the pieces or parcels of land and hereditaments hereinafter described

³ [See post, p. 165, in note.]

⁴ [This deed must be inrolled in the Court of Chancery within six calendar months after the execution; and being so inrolled, it will operate as a bargain and sale, and also as a disentailing assurance under the act 3 & 4 Will. 4, c. 74 (See sec. 41). It will be recollect that no use can be raised upon the estate of the bargainee. Where it is designed to limit a use or uses to be executed by the Statute of Uses, as a use to the tenant in tail himself and his heirs (thereby converting his estate tail into an estate in fee-simple), or uses in bar of dower, or by way of settlement, the disentailing assurance should be by lease and release, (or release alone under the act 4 Vic. c. 21). But a bargain and sale is not improper in the case of a purchase, where the purchaser has not a wife living to whom he was married on or before the 1st January, 1834, or of a mortgage, or in any other case where the party to whom the conveyance is made is to take the entire legal fee.]

and intended to be hereby bargained and sold. AND WHEREAS the said Daniel Den hath contracted with the said Edward East for the absolute sale to him of the said pieces or parcels of land and hereditaments, with the appurtenances and the inheritance thereof in fee-simple, free from all incumbrances, at or for the price or sum of £ . Now THIS INDENTURE WITNESSETH, That in pursuance of the said recited contract, and in consideration of the sum of £ of lawful money of Great Britain to the said Daniel Den, in hand paid by the said Edward East, at or before the sealing and delivery of these presents,⁵ the receipt of which said sum the said Daniel Den doth hereby acknowledge, and of and from the same doth hereby acquit, release, and discharge the said Edward East, his heirs, executors, administrators, and assigns, and for the purpose of disposing of the said pieces or parcels of land and hereditaments hereinafter described for an estate of inheritance in fee-simple absolute, He the said Daniel Den hath bargained and sold, and by these presents doth⁶ bargain and sell unto the said *Edward East and his heirs, All &c. And [*147] all lands, commons, trees, woods, underwood, hedges, ditches, fences, ways, waters, watercourses, easements, profits, emoluments, rights, members, and appurtenances whatsoever to the said pieces or parcels of land and hereditaments belonging or in anywise appertaining, or used, occupied, or enjoyed therewith, or accepted, reputed, deemed, taken, or known as part or parcel thereof, or of any part thereof; and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and all the estate, right, title, interest, property, claim, and demand whatsoever at law or in equity of him the said Daniel Den, in, to, or out of the said pieces or parcels of land and hereditaments, and every part thereof; together with all deeds, evidences, and writings relating to or concerning the said pieces or parcels of land and hereditaments, or any of them, now in the

⁵ [The purchase-money should be retained until the enrolment of the deed. See *Cattell v. Corral*, 4 Yo. & Col. 236.]

⁶ [In every case where the disentailing assurance is not intended to operate as a bargain and sale, it will be prudent, in consequence of the necessary enrolment in Chancery, to omit the words "bargain and sell."]

custody or power of him the said Daniel Den, or which he can or may procure without suit at law or in equity : To HAVE AND TO HOLD the said pieces or parcels of land, hereditaments, and all and singular other the premises hereinbefore described, and bargained and sold, or expressed and intended so to be, unto and to the use of the said Edward East, his heirs and assigns, for ever, freed and absolutely discharged of and from every estate-tail now vested in him the said Daniel Den, and all estates, rights, titles, interests, and powers, limited to take effect after the determination or in defeasance of every such [*148] *estate tail. And the said Edward East doth hereby declare, that no widow whom he may leave shall be entitled to dower out of the said pieces or parcels of land and hereditaments expressed to be hereby bargained and sold, or any part thereof. And the said Daniel Den doth hereby for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree with and to the said Edward East, his heirs and assigns, in manner following, (that is to say) that (for and notwithstanding any act, deed, matter, or thing whatsoever done, executed, or suffered by him the said Daniel Den, or any of his ancestors to the contrary) he the said Daniel Den hath in himself good right, full power, and lawful and absolute authority to convey and assure the said pieces or parcels of land and hereditaments expressed to be hereby bargained and sold, with the appurtenances, unto and to the use of the said Edward East and his heirs, in manner aforesaid, and according to the true intent and meaning of these presents : AND ALSO that it shall be lawful for the said Edward East, his heirs and assigns, at all times hereafter peaceably and quietly to have, hold, use, occupy, possess, and enjoy the said pieces or parcels of land and hereditaments expressed to be hereby bargained and sold, with the appurtenances, and to receive and take the rents, issues, and profits thereof, and of every part thereof, without any let, suit, trouble, denial, eviction, ejection, interruption, or disturbance of, [*149] from, or by the said Daniel Den or his *heirs, or any person or persons lawfully or equitably claiming, or to claim by, from, through, under, or in

trust for him or them, or any of his ancestors, and that free and clear, and freely and clearly acquitted, exonerated, and discharged or otherwise by him the said Daniel Den, his heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified of and from and against all estates, titles, troubles, charges, and incumbrances whatsoever, at any time or times heretofore, or to be at any time or times hereafter, had, made, done, committed, or suffered by the said Daniel Den, or any of his ancestors, or any person or persons lawfully or equitably claiming, or to claim by, from, through, under, or in trust for him or them, or any of them : AND MOREOVER, that he the said Daniel Den and his heirs, and every other person having or lawfully or equitably claiming, or who shall or may have, or lawfully or equitably claim, any estate, right, title, or interest in, to, or out of the pieces or parcels of land and hereditaments expressed to be hereby bargained and sold, or any part thereof, by, from, through, under, or in trust for him or them, or any of his ancestors, shall and will from time to time, and at all times hereafter, at the request, cost, and charges of the said Edward East, his heirs or assigns, make, do, and execute, or cause or procure to be made, done, and executed, all such further and other acts, deeds, and things, conveyances and assurances, whatsoever, for the better, more perfectly, *or satisfactorily conveying and assuring the said [*150] pieces or parcels of land and hereditaments expressed to be hereby bargained and sold, and every part thereof, with the appurtenances, unto the said Edward East, his heirs and assigns, or otherwise, as he or they shall direct or appoint, as by the said Edward East, his heirs or assigns, or his or their counsel in the law shall be reasonably advised or devised and required. In witness, &c.

***RELEASE IN FEE.**

**UNDER THE ACT 4 VIC. C. 21, TO A PURCHASER AND HIS TRUSTEE
TO PREVENT DOWER; AND IN WHICH THE WIFE OF THE VENDOR
CONCOURS FOR THE PURPOSE OF RELEASING HER DOWER.**

THIS Indenture, made the 1st day of January, in the year of our Lord one Thousand eight hundred and Forty-three, (in pursuance of an Act of Parliament passed in the fourth year of the reign of her present Majesty, intituled "An Act for rendering a Release as effectual for the Conveyance of Freehold Estates as a Lease and Release by the same parties:") Between George Gross, of in the county of Middlesex, Esquire, and Mary his wife, of the first part; Henry Howard, of in the aforesaid county, Gentleman, of the second part; and John James, of the same place, Linen Draper (a trustee nominated by and on the behalf of the said Henry Howard), of the third part: WHEREAS the said Henry Howard hath contracted and agreed with the said George Gross for the absolute purchase of the messuages or tenements, lands and hereditaments hereinafter granted and released, or *intended so to be, and the inheritance thereof, in fee-simple, with the appurtenances, free from incumbrances, at or for the price or sum of three thousand pounds: Now THIS INDENTURE WITNESSETH, That in pursuance of this said agreement, and in consideration of the sum of three thousand pounds of lawful money of Great Britain to the said George Gross in hand paid by the said Henry Howard, at or before the sealing and delivery of these presents, the receipt of which said sum (being in full for the absolute purchase of the messuages or tenements, and hereditaments hereinafter granted and released, or intended so to be) he the said George Gross doth hereby acknowledge; and of and from the same, and every part thereof, doth acquit, release, and discharge the said Henry Howard, his heirs, executors, administrators, and assigns, and every of them for ever by these presents, he the said George Gross Hath granted,

bargained, sold, aliened, released, and confirmed, and by these presents Doth grant, bargain, sell, alien, release, and confirm, and the said Mary Gross for the purpose of releasing and extinguishing her right to dower in the hereditaments hereinafter described and intended to be hereby granted and released, Hath remised, and released, and by these presents doth remise, and release unto the said Henry Howard, and to his heirs, all those the messuages, lands, &c. &c., together with all out-houses, edifices, buildings, barns, dove-houses, stables, yards, gardens, orchards, lights, *easements, ways, [*153] waters, watercourses, commons, commodities, privileges, emoluments, advantages, hereditaments, and appurtenances⁷ whatsoever to the said messuages or tenements, lands and hereditaments, belonging or in any wise appertaining, or accepted, reputed, taken, or known as part, parcel, or member thereof; and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of all and singular the premises ; and also all the estate, right, title, interest, use, trust, property, possession, benefit, claim, and demand whatsoever, both at law and in equity, of them the said George Gross and Mary his wife and each of them of, in, to, or out of the said messuages or tenements, lands, hereditaments, and premises hereby granted and released, or intended so to be, and every of them, and every part and parcel thereof; together with true and attested copies of all deeds, evidences, and writings, comprised or mentioned in the schedule hereunder written ; the first of such copies to be made, written, and delivered by and at the costs and charges of the said George Gross; but the second and all future copies thereof to be made, written, or taken at the reasonable request, costs, and charges of the said Henry [*154] *Howard, his heirs or assigns : To Have and to Hold the said messuages or tenements, lands, hereditaments, and other the premises hereby granted and re-

⁷ [As to the effect of these general words, particularly the word "appurtenances," see 1 Plow. 170, Dy. 130, b, Palm. 375, Cro. El. 16, Plant v. James, 5 Barn. & Adol. 791, 4 Adol. & El. S. C. (in Error), Chapman v. Gatcombe, 2 Bing. N. C. 516, Hinchcliffe v. Earl of Kinnoul, 5 Bing. N. C. 1, Doe v. Webster, 12 Adol. & El. 442.]

leased, or intended so to be, with the appurtenances, unto the said Henry Howard and his heirs for ever.³

³ If it be intended that the releases should take an estate in fee-simple or fee-tail, it is absolutely necessary that it should be ascertained by words of limitation. Litt. s. 465.

It may not be unacceptable, in this place, to offer a few observations upon the different powers of the premises and the habendum, when both limit distinct estates, and in such limitation are repugnant to, and inconsistent with, each other.

It may be deemed an established rule, that where no estate is expressed in the premises (in which case the grantee has an estate for life by implication), and an express estate is limited by the habendum, the habendum shall control the implied estate created by the premises. Co. Litt. 183, a. Thus, if land or rent be granted to I. S. generally, habendum to him *for years, or at will*; by the premises I. S. takes an implied estate for life, but the habendum abridges it into an express estate for years, or at will. *Ibid.* 8 Co. 184, b. In such a case, if the habendum be void, yet the implied estate for life created by the premises shall not hold against the express estate made by the habendum, though such express estate be altogether ineffectual. Therefore, if land be given to A. generally, by the premises, habendum, after the death of the grantor, to A. in fee, in tail, or for life, in this case the whole deed is void; for there can be no estate of freehold made to commence *in futuro*, and the implied estate for life cannot make it a grant to begin presently in possession. 2 Co. 55, a. b. Cro. Eliz. 254, 255. But if there be an express estate limited to A. in fee by the premises, habendum, after the death of the grantor, to A. in tail; in this case the habendum is void, and A. shall take a present estate by the premises. 3 Lev. 339, Carter v. Madgwick. *Vide* Dyer, 272, a. pl. 30. 2 Roll. Ab. 68, pl. 4. Hob. 171. Moor, 881, pl. 1236. [Goodtill v. Gibbs, 5 Barn. & Cress. 709.]

So it is a rule, that where an express estate is limited in the premises, and an estate is created by the habendum in abridgment of, inconsistent with, or repugnant to, the estate limited in the premises, in such case the premises shall be good, and the habendum void. Thus if lands be conveyed to I. S. and his heirs, habendum to him for life; I. S. has an estate in fee by the premises, and the habendum is void. 8 Co. 56, b. 2 Co. 24, a. Plowd. 152, 153. 2 Bac. Ab. 494.

We are to observe, with respect to this rule, that whenever a ceremony or formality is requisite to the perfection of the estate limited in the premises, besides the delivery of the deed, (such as livery of seisin,) and no other ceremony is necessary to complete the estate limited by the habendum, than the mere delivery of the deed; in all such cases the estate created by the habendum shall stand, and that limited by the premises shall be void. Thus, if A. grant an estate to B. and his heirs, habendum to B. for years, the habendum shall abridge the estate in fee given by the premises into an estate for years. 2 Co. 24, a. The reason of this construction is, that by the delivery of the deed the estate for years limited by the habendum is perfected; whereas another process (*viz.*, livery of seisin) is required to vest the estate of freehold. When B. has the estate for years once vested in him, no subsequent ceremony can divest it out of him. This construction evidently depends upon the actual priority of the delivery of the deed; and I conceive, that it will hold in the case of a bargain and sale, because the enrolment, like livery of seisin in the case of a feoffment, will come too late to divest the estate for years previously vested in B. by the delivery of the deed. But the reasons of this construction do not, I apprehend, apply to the conveyance by lease and release; for if a man convey by lease and release to B. in fee, habendum to him for years, the fee, as well as the term of years, may vest in B. by the mere delivery of the deed; and as the law says, that every grant shall be taken most strongly against the grantor, B. will have an estate in fee by the premises, and the habendum will be void, according to the rule just mentioned. So, upon the same principle, if a grant had been made of a rent *in esse*, or a seignory, to I. S. and his heirs, habendum to him for

Nevertheless, To the use *of such person or persons, for such estate or estates, interest or inte- [*155]

years, or for life; although in this case another ceremony was formerly requisite, besides the delivery of the deed, viz. attornment, yet as that ceremony was as necessary upon the grant of a rent in case, or seignory, to create an estate for years or for life, as an estate in fee, the habendum in such case was void. 2 Co. 24, a.

This rule, that where the habendum is repugnant to, or inconsistent with, the express estate limited in the premises, the habendum is void, was evidently established in favour of the grantee, and to the disadvantage of the grantor; for where an express estate in fee-simple is given by the premises, the grantor shall not be allowed to abridge it by the habendum into a mere estate for years or for life. But the reasons of the above rule fail whenever the grantee's interest is enlarged by the habendum, even where there is an express estate limited to him by the premises. Therefore, what has been advanced concerning the above rule may be corrected with this observation, that the habendum, when inconsistent with, or repugnant to, the premises, can never abridge an express estate given by the latter to the grantee, whenever there is the same ceremony required to perfect the estate limited in the premises, and that created by the habendum; but that the habendum may enlarge the estate limited in the premises under similar circumstances. Thus, if an estate be granted to A. for life, habendum to him in fee, the same formality being requisite to create both estates, the habendum shall enlarge the estate for life into an estate in fee. Co. Litt. 299, a.

It is clear also, that the above doctrine in favour of the grantee depends chiefly upon the inconsistency and repugnancy of the habendum. Thus, to put the same case again, an estate is given to A. and his heirs, habendum to him for life: this habendum is totally void, and A. has a fee-simple by the premises: the former creates an estate of inheritance, whilst the habendum limits it to an estate for life; the habendum therefore is quite inconsistent with, and repugnant to, the premises. But though the grantor be not allowed entirely to alter the nature of the estate of the grantee, yet he is suffered to qualify it, if there be no inconsistency in so doing. Therefore if a man grant lands to another and his heirs, habendum to him and the heirs of his body; in such case the habendum qualifies the premises, and the grantee has an estate tail, with a fee-simple expectant thereon. Co. Litt. 21, a. *Turnman v. Cooper*, Cro. Jac. 476. (*Sed contra*, as to the expectant fee thereon, *Perk.* a. 170.. 8 Co. 154, b.) The word heirs is extensive, and may relate to heirs special, as well as general; and the grantor by the habendum signifies what heirs he intended to describe. Upon the same principle, if a conveyance be made to A. and his heirs, habendum to him and his heirs during the lives of B., C., and D.; the word heirs, in this case, in the premises is as applicable to a descendible estate of freehold, as to a fee-simple; the habendum therefore explains the premises; it declares that the word *heirs* in the premises was merely applicable to an estate of freehold descendible to heirs during the lives of B., C., and D. *T. Jones*, 4. So, too, if lands be granted to A. and the heirs of his body, habendum to him in fee; A. has by the premises an estate tail, and by the habendum a fee-simple expectant thereon. 8 Co. 154, b.

The habendum is sometimes used to explain the nature of the estates which grantees are intended to take. Thus, if a feoffment be made to A. and B. of twenty acres, habendum, as to one moiety, to A., habendum, as to the other moiety, to B.; by the premises A. and B. take a joint estate, and by the habendum they are tenants in common; and yet the habendum is good. Co. Litt. 183, b.; 190, b. The habendum, in this instance, is not repugnant to the premises, because it makes no division of that undivided possession, which is given by the latter. However, if the premises limit twenty acres to A. and B., and the habendum expressly give ten acres to A. and the other ten acres to B., the habendum is void; for it makes an express division of the acres; which is inconsistent with the undivided possession limited by the premises. 1 P. W. 19.

So if a lease be made to two, habendum to the one for life, remainder to the other for life, this habendum is good. 2 Co. 55, b.; Co. Litt. 183, b. *Dowse's case*. Cro. El. 25, 89; 2 Roll. Ab. 65.

rests, and to and for such intents and purposes, and under and subject to such powers, provisoos, declarati[*156]ons, and agreements, *and in such manner and form as he the said Henry Howard by any deed or deeds, to be by him duly executed, shall from time to time, or at any time or times, direct, limit, or appoint; [*157] and *in default of, and until such direction, limitation, or appointment, and as to such part or parts of the premises of which no complete direction or [*158] appointment shall be made, or to which any such [*158] *direction or appointment shall not extend, [To the use of the said Henry Howard and his assigns during his life, without impeachment of waste, And from and after the determination of that estate by any means in his lifetime, To the use of the said John James and his heirs, during the life of the said Henry Howard, in trust nevertheless for the said Henry Howard and his assigns; And from and after the determination of the estate so limited in use to the said John James, and his heirs, during the life of the said Henry Howard,] To the only use and behoof of the said Henry Howard, his heirs and assigns, for ever.¹ *And the said Henry Howard doth hereby declare, [*159] that no widow whom he may happen to leave shall be entitled to dower out of the messuages or tenements, lands and hereditaments hereinbefore described, and hereby granted and released, or any part thereof. And the said George Gross, for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree to and with the said Henry Howard, his appointees, heirs, and assigns, in manner

A grant was made to A., habendum to him, B., and C., *pro termino vita eorum, et alterius eorum successive diutius viventium*; it was holden, that the habendum was void: for neither B. nor C. could take anything as lessee in possession, because they were not parties to the deed, nor were they named in the premises; nor could they take jointly by way of remainder, because the limitation was to them *successive*; neither could they take in succession, because it did not appear who should take first. Hob. 313, *Windmore v. Hobart*.

¹ With respect to the part in brackets, see ante, p. 109, in note.

¹ The mode of preventing dower, introduced in this precedent, appears to have been suggested by the late Mr. Fearne, (vide Cont. Remainders, 347, note, 9th ed.) in consequence of the principle established in *Duncombe v. Duncombe*, 3 Lev. 437.

For the different methods of barring a woman of her dower, see Mr. Butler's notes, Co. Litt. 216, a. 379, b.

following; (that is to say,) That the said Mary Gross (she hereby consenting,) shall and will forthwith, or as soon as conveniently may be after the execution of these presents at the costs and charges of him the said George Gross, his heirs, executors, or administrators, duly acknowledge this deed pursuant to the act of parliament for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance, and do all requisite acts, for giving effect to such acknowledgement, and for causing a proper certificate thereof to be filed of record in the Court of Common Pleas at Westminster: And further, That (for and notwithstanding any act, deed, matter, or thing whatsoever, made, done, executed, committed, occasioned, or suffered by him the said George Gross, or any of his ancestors, to the contrary) he the said George Gross is, at the time of the sealing and delivery of these presents, lawfully, rightfully, and absolutely seised of, or well and sufficiently entitled to, the messuages or tenements, lands, hereditaments, and premises *hereby granted and released, [*160] or intended so to be, with the appurtenances, for a perfect, lawful, and indefeasible estate of inheritance in fee-simple in possession: And that (for and notwithstanding any such act, matter, or thing as aforesaid) the said George Gross, and the said Mary his wife, or one of them, have or hath in themselves, himself, or herself, good right, full power, and lawful and absolute authority to grant, bargain, sell, alien, release, convey, and assure the messuages or tenements, lands, hereditaments, and premises hereby granted and released, or intended so to be, and every part thereof, with the appurtenances, unto the said Henry Howard and his heirs, in manner aforesaid, and according to the true intent and meaning of these presents: And also that it shall be lawful for the said Henry Howard, his appointees, heirs, and assigns, from time to time, and at all times hereafter, peaceably and quietly to have, hold, use, occupy, possess, and enjoy the said messuages or tenements, lands, hereditaments, and premises hereby granted and released, or intended so to be, and every part thereof, with the appurtenances, and to receive and take the rents, issues, and profits

thereof, and of every part thereof, from Midsummer-day now last past, without any let, suit, trouble, denial, eviction, ejection, interruption, or disturbance of, from, or by the said George Gross or his heirs, or any other person or persons lawfully or equitably claiming or to claim by, from, through, under, or in trust for him or them, or any [*161] of *them, or by, from, through, or under any of his ancestors; and that free and clear, and freely and clearly acquitted, exonerated, and discharged, or otherwise by him the said George Gross, his heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified, of, from, and against all and all manner of estates, titles, troubles, charges, and incumbrances whatsoever, at any time or times heretofore, or to be at any time or times hereafter, had, made, done, committed, executed, occasioned, or suffered by him the said George Gross, or any of his ancestors, or by any other person or persons lawfully or equitably claiming or to claim by, from, through, under, or in trust for him, them, or any of them;² And

² The grantor covenants, 1st. That, notwithstanding any act done by him or his ancestors, he is seised in fee. 2dly. That notwithstanding any such act, he has a good right to grant, &c. 3dly. That the grantee may peaceably enjoy the premises without any interruption, &c., by the grantor, or by any other person or persons claiming by or under him or his ancestors. 4thly. That the premises are free from all incumbrances, &c., occasioned by him or his ancestors, or any claiming under them. [And 5thly. That he and all persons claiming under him or his ancestors will execute further assurances.] The two first covenants may be considered synonymous (*Browning v. Wright*, 2 Bos. & Puller, 13;) but the third and fourth are distinct; and therefore qualifying words in the beginning of the first covenant, will not extend to third. See *Howell v. Richards*, 11 East. 633.

In the case of *Nervin v. Muns*, 3 Lev. 46, a grantor covenanted, 1st. That notwithstanding any act done by him to the contrary, he was seised in fee-simple, &c. 2dly. That he had a good power and lawful authority to sell. 3dly. That the lands were free from any incumbrances made by him, his father, or his grandfather. 4thly. That the grantee should enjoy against all persons claiming under him, his father, or his grandfather. The question was, whether the words in the first covenant, *notwithstanding any act done by him*, extended to the second covenant? For if they did, then there was no breach of covenant. It was admitted by the whole court, that all these covenants were several and distinct; and three of the judges held, against the opinion of North, C. J., that, though these covenants were distinct, yet the two first were synonymous, and of the same nature; for if a man were seised in fee, he certainly had good right and full power to sell: and it could not be intended, that when the grantor covenanted against his own acts, he should immediately after, by a covenant of the same nature, covenant against the acts of the whole world. [See *Stannard v. Forbes*, 6 Adol. & El. 572.]

It is however clear, that where covenants are several, and at the same time are of different natures, and concern different things, restrictive words in one

moreover, that he the said George Gross and his heirs, and *every other person having, or lawfully [*162] or equitably claiming, or who shall or may have,

covenant will not qualify or restrain the generality of the other. This point is explained in the case of *Gainsford v. Griffith*, 1 Saund. 58, 2 Keb. 201, 213. 1 Sid. 328. A lessor covenanted, that the lease in question was a good, certain, and indefeasible lease in the law, and should so remain for the residue of the term; and that the lessee should quietly and peaceably enjoy and hold the premises during the term, without the lawful let, suit, trouble, or interruption of the lessor, his executors or administrators; and that the lessee should be saved harmless, and indemnified from all incumbrances, made, committed, suffered, or done by the lessor: the question was, whether the restrictive words at the end of the last covenant qualified and explained the first? and it was holden, that they were distinct sentences, and of different natures; and therefore the words at the end of the last sentence, which qualified the covenant against incumbrances to such incumbrances as were committed by the lessor, could not extend to the former covenant, that the lease was a good, indefeasible lease, &c. [As to what amounts to a breach of covenant for quiet enjoyment, see *Woodhouse v. Jenkins*, 9 Bing. 431. *Blatchford v. the Mayor of Plymouth*, 3 Bing. N. C. 691.]

So, where a man covenanted, that he was seized of a certain manor in fee, notwithstanding any act done by him or any of his ancestors; and that no reversion or remainder was in the king, or any other; and that the said manor was of the annual value of three hundred pounds per annum; it was holden, that these covenants were absolute and distinct, and that the restrictive words in the first covenant could not qualify the last sentence respecting the value. *Crayford v. Crayford*, Cro. Car. 106. The same point was determined in the case of *Hughes v. Bennett*, Cro. Car. 495.

However, when several sentences make but one entire covenant, restrictive words in one sentence may be extended to, and qualify, the other sentences; provided the sense will admit of it. Thus, where a termor assigned his term, and covenanted, that he had not made any grant, or done any thing, by means whereof the grant or assignment could in any manner be impaired, hindered, or frustrated; but that the assignee should enjoy without any impediment or disturbance by him or any other person: it was adjudged, that this was but one sentence, and that the express restrictive words in the beginning of the covenant restrained and qualified the generality of the subsequent words, by any other person. *Dyer*, 240, a. b. pl. 43. *Gervis v. Pead*, Cro. El. 615. [*Stannard v. Forbes*, 6 *Adol.* & El. 572.]

In the case of *Trenchard v. Hoskins*, (Lit. Rep. 62 to 69, 203 to 211,) a grantor covenanted that he was seized in fee, and that he had a good and lawful authority to sell, and that there was no reversion or remainder in the crown, notwithstanding any act done by him. The question was, whether the last restrictive words explained the preceding covenants, that he was seized in fee, &c.? It was determined in the Common Pleas, that these were three distinct and several covenants, and therefore the restrictive words in the last sentence could not extend to the first. But, upon a writ of error in the King's Bench, this judgment was reversed (2 Keb. 201,) though that reversal was never entered. 1 Sid. 328. The opinion of the Court of King's Bench, that the three sentences in the above case made but one entire covenant, seems to be over-ruled by the subsequent decision in the before-cited case of *Nervin v. Muns*.

It should seem, that an express covenant may qualify and restrain the operation of a preceding *implied* covenant. Thus, any express covenant on the part of a grantor will qualify the generality of the implied covenant, or warranty, produced by the word *grant*, when that word is used to pass a *chattel* interest; for it seems, with respect to a freehold, or inheritance, that that word does not import any warranty or implied covenant. See *But. Co. Litt.* 384, s. n. 1. 1 *Ves.* 101. *Vaugh.* 126. 4 *Co. 80 b.* *Noke's case*. It must be observed, that, in grants of estates of freehold, the word *give* creates an implied warranty, the

or lawfully or equitably claim any estate, right, title, trust, or interest in, to, or out of the messuages [*163] *or tenements, lands, hereditaments, and premises hereby granted and released, or intended so to be or any part thereof, by, from, through, under, or in trust [*164] for him or them, or by, from, *through, or under any of his ancestors, shall and will from time to time, and at all times hereafter, at the request, costs, and charges of the said Henry Howard, his appointees, heirs, or assigns, make, do, acknowledge, and execute, or cause or procure to be made, done, acknowledged, and executed, all such further and other lawful and reasonable acts, deeds, and things, conveyances, and assurances whatsoever, for the better, more perfectly, or satisfactorily granting, releasing, conveying, assuring, and confirming [*165] the messuages *or tenements, lands, hereditaments, and premises hereby granted and released, or intended so to be, and every part thereof with the appurtenances, unto the said Henry Howard, his appointees, heirs, and assigns, or otherwise, as he or they shall direct or appoint; as by the said Henry Howard, his appointees, heirs, or assigns, or his or their, or any of their counsel in the law, shall be reasonably advised, or devised, and required;³ [so that no such further assurance or assurances contain, or imply, any further or other warranty, or covenant, than against the person or persons who shall make and execute the same, and his, her, or their heirs, executors, and administrators, acts and deeds only; and] so that the person or persons who shall be required to make and execute any such further assurance or assurances, be not compelled or compellable, for the

generality of which cannot be controlled by any express covenant. Co. Litt. 384, a. Litt. Rep. 64. [But see 6 Adol. & El. 587.] So, if a man make a lease for years rendering rent, and add express warranty; the express warranty does not take away the warranty in law; for the lessee has his election to vouch by force of either of them. 4 Co. 81, a. Co. Litt. 384, a.

[On the subject of covenants for title, see Sug. Vend. & Pur. vol. ii. pp. 449, et seq. 514, 10th ed.]

³ [The words in brackets are unnecessary, since it has been decided that a covenant for further assurance does not oblige the covenantor to enter into any covenants or warranty of title whatever. Coles v. Kinder, Cro. Jac. 571. Staynrode v. Locock, ib. 115. Whether under a covenant for further assurance the covenantor can be required to enter into a covenant for production of the title-deeds, see Fain v. Ayers, 2 Sim. & Stu. 533.]

making or doing thereof, to go or travel from his, her, or their dwelling or respective dwellings, or usual place or places of abode or residence. AND WHEREAS the several title-deeds and writings relating to the said hereditaments and premises do concern the title not only of the hereditaments hereby granted and released, or intended so to be, but also of divers other estates and hereditments [*166] *of, or belonging to, the said George Gross, situate and being in the said county of Middlesex, and in other counties of England; and therefore it hath been agreed, that the same several deeds and writings shall remain in the custody and possession of the said George Gross, his heirs and assigns, upon his entering into such covenant for the production thereof as hereinafter is contained: AND THEREFORE THIS INDENTURE FURTHER WITNESSETH, That in pursuance of the said last-mentioned agreement, and for the consideration hereinbefore expressed, he the said George Gross, for himself, his heirs, executors, administrators, and assigns, doth hereby further covenant, promise, and agree, to and with the said Henry Howard, his appointees, heirs, and assigns, that he the said George Gross, his heirs, executors, administrators, or assigns, shall and will, from time to time, and at all or any time or times hereafter (unless prevented by fire or any other inevitable accident,) upon every reasonable request, and at the proper costs and charges of the said Henry Howard, his appointees, heirs, or assigns, produce and show forth, or cause to be produced or shown forth, to the said Henry Howard, his appointees, heirs, or assigns, or to such person or persons as he or they shall direct, desire, or require, or at any trial, hearing, or examination in any court of law or equity, or other judicature, or upon the execution of any commission in England, as occasion shall be or require, the several deeds, evidences, and writings mentioned in the schedule thereof hereunder *written or hereunto annexed, and every or any of them, and at the like request, [*167] costs, and charges, make and deliver, or cause to be made and delivered unto the said Henry Howard, his appointees, heirs, or assigns, attested or other copies or abstracts of, or extracts from, all and every, or any of the same

deeds, evidences, and writings, and permit such copies, abstracts, or extracts to be examined and compared with the originals, by any person or persons whom he or they may appoint for the manifestation, defence, and support of the estate, right, title, interest, property, or possession of the said Henry Howard, his appointees, heirs, and assigns, of, in, or to all or any part of the messuages or tenements, lands, hereditaments, and premises hereby granted and released, or expressed and intended so to be, with the appurtenances. In witness, &c.

[*The Schedule to which the above written Indenture refers.*]

[*168] *MARRIAGE SETTLEMENT BY
DEED OF RELEASE.

THIS Indenture, made the first day of April, one thousand eight hundred and forty-three, (in pursuance, so far as the same is intended to operate as a release, of an act of parliament passed in the fourth year of the reign of her present Majesty, intituled "An act for rendering a Release as effectual for the conveyance of Freehold Estates as a Lease and Release by the same parties,") Between Adam Ash, of &c., of the first part: Benjamin Brown, of &c., and Celia Brown, spinster, one of the daughters of the said Benjamin Brown, of the second part; Cornelius Crosby, of &c., and Charles Crompton, of &c., of the third part; David Dun, of &c., and Daniel Drew, of &c., of the fourth part; and Edgar Edwards, of &c., and Edmund Eames, of &c., of the fifth part.⁴

*WHEREAS a marriage is intended to be shortly [*169] had and solemnised between the said Adam Ash and Celia Brown; and the said Benjamin Brown hath agreed to pay the sum of £ unto the said Adam

⁴ [If protectors should be appointed under the act for the abolition of fines and recoveries (3 & 4 Will. 4, c. 74, s. 32), they would be parties of the sixth part.]

Ash, as and for the marriage portion of the said Celia Brown his daughter:

NOW THIS INDEMNITY WITNESSETH, That in consideration of the said intended marriage, and of the sum of £ , lawful money of Great Britain, to the said Adam Ash in hand paid by the said Benjamin Brown, at or before the sealing and delivery of these presents; the receipt and payment whereof he the said Adam Ash doth hereby acknowledge, and of and from the same, and every part thereof, doth release and acquit the said Benjamin Brown, his heirs, executors, administrators, and assigns, and every of them, for ever, by these presents; and for making such provision and settlement for and upon the said Celia Brown, and the issue of the said intended marriage, as hereinafter mentioned; and for settling and assuring the hereditaments hereinafter granted and released, or intended so to be, with the appurtenances, to the uses, upon the trusts, for the intents and purposes, and under and subject to the powers, provisoies, declarations, limitations, and agreements, herein-after limited, expressed, and declared of and concerning the same; and for and in consideration of the sum of five shillings of like lawful money to the said Adam Ash in hand paid by the said Cornelius Crosby *and [**170] Charles Crompton, at or before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged), he the said Adam Ash Hath granted, bargained, sold, released, and confirmed, and by these presents Doth grant, bargain, sell, release and confirm unto the said Cornelius Crosby and Charles Crompton, and their heirs, all, &c.; and all houses, outhouses, &c., and the reversion and reversions, remainder and remainders, and yearly and other rents, issues and profits of all and singular the premises; and all the estate, right, title, interest, trust, property, claim, and demand whatsoever of him the said Adam Ash, of, in, to, or out of the said messuages, lands, tenements, hereditaments, and premises, and every of them, and every part and parcel of them, and every of them:

To Have and to Hold the messuages or tenements, lands, hereditaments, and other the premises hereby

granted and released, or intended so to be, with their and every of their rights, members, and appurtenances, unto the said Cornelius Crosby and Charles Crompton, and their heirs forever; nevertheless to the uses, upon the trusts, for the intents and purposes, and under and subject to the powers, provisoies, limitations, declarations, and agreements hereinafter limited, expressed, and declared of and concerning the same; that is to say,

[*171] To the use of the said Adam Ash, his heirs, and assigns, until the said intended marriage shall be had and solemnised; and from and immediately after the solemnisation thereof,

To the use of the said David Dun and Daniel Drew, their executors, administrators, and assigns, for and during, and unto the full end and term of ninety-nine years thence next ensuing, and fully to be complete and ended; upon the trusts, and subject to the provisoies and agreements hereinafter expressed and declared of and concerning the same; and from and after the end, expiration, or other sooner determination of the said term of ninety-nine years, and in the mean time subject thereto, and to the trust thereof.

To the use of the said Adam Ash and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste; and from and after the determination of that estate by forfeiture or otherwise.

To the use of the said Cornelius Crosby and Charles Crompton and their heirs, during the life of the said Adam Ash, In Trust to support the contingent uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries or bring actions, as the case may require; yet, nevertheless to permit and suffer the said Adam Ash and his assigns to receive and take the rents, issues, and profits thereof, and of every part thereof, to and from his and their [*172] own use and benefit; and from and immediately after the decease of the said Adam Ash,

To the use, intent, and purpose, that the said Celia Brown (in case she shall survive the said Adam Ash,) and her assigns, shall and may, from and after the

decease of the said Adam Ash, yearly have, receive, take, and enjoy, for and during the term of her natural life, one annual sum or yearly rent-charge of £ [redacted] of lawful money of Great Britain, to be yearly issuing, going, and payable out of, and charged and chargeable upon, all and singular the messuages, lands, tenements, hereditaments, and premises hereinbefore granted and released, or intended so to be; such yearly rent-charge or sum of £ [redacted] to be in full for the jointure of the said Celia Brown, and in lieu, bar, and satisfaction of and for her whole dower or thirds at common law, or by or on account of custom, free-bench or widow's part, which she can or may, or otherwise might have, or claim, of, in, or out of all and every, or any of the freehold, copyhold, or customary manors, messuages, lands, tenements, and hereditaments whereof or whereunto the said Adam Ash now is, or at any time or times during the said intended coverture, shall be seised or entitled, for any estate of freehold or copyhold of inheritance, or to which dower or free-bench is incident; and to be paid to the said Celia Brown or her assigns, at or in the common dining-hall of Lincoln's Inn, in the county of [*173]
*Middlesex, on the four most usual feasts, or days of payment of rent in the year (that is to say,) on the twenty-fifth day of March, the twenty-fourth day of June, the twenty-ninth day of September, and the twenty-fifth day of December, in every year, by equal and even portions; free from taxes, and without any other deduction whatsoever [except on account of the present or any future tax upon property or income]; the first quarterly payment to begin and be made on such of the said days as shall first happen after the decease of the said Adam Ash.

And to and for this further use, intent, and purpose, that in case the said annual sum or yearly rent-charge of £ [redacted], or any part thereof, shall at any time or times be in arrear or unpaid, by the space of fourteen days next over or after any of the said days, whereon the same ought to be paid as aforesaid, then and so often, it shall and may be lawful to and for the said Celia Brown and her assigns, during her natural life, into and

upon the said messuages, lands, tenements, hereditaments, and premises so charged with the said annual sum, or yearly rent-charge, of £ as aforesaid, and into and upon every or any part or parcel thereof, to enter and distrain; and the distress and distresses then and there found to take, lead, drive, carry away, and impound, and in pound to detain and keep, until the said annual sum or yearly rent-charge, and all arrears thereof, together with all costs, charges, *and expenses, occasioned and incurred by taking and keeping such distress and distresses, shall be fully paid and satisfied; and in default of payment thereof, or of any part thereof respectively, in due time after such distress or distresses shall be taken, to appraise, sell, and dispose of, or cause to be appraised, sold, and disposed of, such distress or distresses, or otherwise to act therein according to the due course of law, and in like manner as in cases of distress taken for non-payment of rent reserved upon common leases; to the intent, that she the said Celia Brown, or her assigns, shall and may be fully paid and satisfied the said annual sum or yearly rent-charge of £ and all arrears thereof, and all costs, charges, and expenses attending the non-payment and recovery of the same.

And to and for this future use, intent, and purpose, that in case the said annual sum or yearly rent-charge of £ , or any part thereof, shall at any time or times be in arrear or unpaid by the space of twenty-eight days next after any of the said days hereinbefore mentioned and appointed for payment thereof, then and so often as the same shall happen (although no formal or legal demand thereof shall be made), it shall and may be lawful to and for the said Celia Brown and her assigns, into and upon all and singular the said hereditaments and premises, or into and upon any part thereof, in the name of the whole, to enter, and the same to have, hold, occupy, possess, *and enjoy, and the rents, issues, and profits thereof, and of every part thereof, to have, receive, and take to and for her and their own use and benefit, until she and they shall thereby and therewith, or by any other ways, be fully paid and satisfied the said

annual sum or rent-charge of £ , and all arrears thereof, and all such arrears of the same as shall grow due or incur during the time that she or they shall by virtue of such entry or entries be in possession of the premises, or any part thereof; together with all costs, charges, and expenses whatsoever attending, or occasioned by, the non-payment or recovery of the same, or any part thereof, or in relation thereto; such possession, when taken, to be without impeachment of waste.

And as, to, for, and concerning all and singular the messuages, lands, tenements, hereditaments, and premises hereby granted and released, or intended so to be, with the appurtenances, from and after the decease of the said Adam Ash, subject to, and charged with, the said yearly rent-charge or sum of £ , and to the remedies hereby provided for the recovery thereof, To the use of the said Edgar Edwards and Edmund Eames, their executors, administrators, and assigns, for and during, and unto the full end and term of five hundred years thence next ensuing, and fully to be complete and ended, without impeachment of or for any manner of waste; upon the several trusts, to and for the several intents *and purposes, and under and subject to [*176] the several provisoies and agreements hereinafter expressed and declared of and concerning the said term; and from and after the end, expiration, or other sooner determination of the said term of five hundred years, and in the meantime subject thereto, and to the trusts thereof, and charged and chargeable as aforesaid.

To the use of the first son of the body of the said Adam Ash on the body of the said Celia Brown, his intended wife, to be begotten, and of the heirs male of the body of such first son lawfully issuing; and for default of such issue,

To the use of the second, third, fourth, fifth, and all and every other the son and sons of the body of the said Adam Ash on the body of the said Celia Brown to be begotten, severally, successively, and in remainder, one after another, as they and every of them shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and

every such son and sons lawfully issuing; the elder of such sons, and the heirs male of his body issuing, being always to be preferred and to take before the younger of such sons, and the heirs male of his and their body and respective bodies issuing ; and for default of such issue,

To the use of all and every the daughter and daughters [*177] of the said Adam Ash on the body of *the said Celia Brown, his intended wife, to be begotten, equally to be divided between or amongst them, share and share alike, as tenants in common, and not as joint tenants, and of the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing ; and in case there shall be a failure of issue of any one or more of such daughters, then as well as to the original share or shares of, as the share or shares surviving or accruing to, such last-mentioned daughter or daughters or her or their issue, to the use of all and every other the daughter and daughters of the said Adam Ash on the body of the said Celia Brown to be begotten, equally to be divided between or among them, if more than one, share and share alike, as tenants in common, and not as joint tenants, and of the several and respective heirs of their bodies issuing ; and in case all such daughters but one shall happen to die without issue, or if there shall be but one such daughter, then to the use of such one daughter, and of the heirs of her body lawfully issuing ; and for default of such issue,

To the use of the said Adam Ash, his heirs and assigns for ever.

And as, to, for, and concerning the said term of ninety-nine years hereinbefore limited in use to the said David Dun and Daniel Drew, their executors, administrators, and assigns as aforesaid, it is hereby agreed [*178] and declared, that the same is so *limited to them upon the trusts, for the intents and purposes, and under and subject to the agreements and provisoies hereinafter expressed and declared of and concerning the same ; (that is to say,)

Upon trust, that they the said David Dun and Daniel Drew, and the survivor of them, and the executors, administrators, and assigns of such survivor, shall and

do, during the joint lives of the said Adam Ash and Celia Brown, his intended wife, by, with, and out of the annual rents, issues, and profits of the hereditaments and premises comprised in the said term of ninety-years, or by mortgage, sale, or other disposition of the said hereditaments and premises, or any of them, or any part or parts thereof, for all or any part of the said term of ninety-nine years therein, or by bringing actions against any of the tenants or occupiers of the premises for the rent then in arrear, or by all or any of the said ways or means, or by any ways or means, levy and raise the annual sum of £ of lawful money of Great Britain, free and clear of and from all taxes and deductions whatsoever; (except on account of the tax on property or income) and do and shall pay, apply, and dispose of the same by quarterly payments, on the days of payment hereinbefore mentioned, by even and equal portions, into the proper hands of the said Celia Brown, or unto such person or persons, and for such intents and purposes only as she by any writing or writings under her *hand, from time to time, notwithstanding her [*179] coverture (but not by way of anticipation), shall direct or appoint; to the intent that the same annual sum may be for the sole and separate use and benefit of the said Celia Brown, and not subject to the debts, contracts, engagements, or control of the said Adam Ash, her intended husband, nor in anywise alienable, and so that the receipt or receipts in writing of the said Celia Brown, or of such person or persons as she shall from time to time direct or appoint to receive all or any part of the said annual sum of £ which shall have actually accrued due, and no other receipt or receipts shall from time to time, notwithstanding the said intended coverture, be good and effectual receipts and discharges for such sums of money, as in such receipts and discharges shall be respectively expressed to be received; the first quarterly payment of the said annual sum of £ to be made on such of the said days of payment, as shall first happen after the solemnization of the said intended marriage:

And upon further trust, that they the said David Dun and Daniel Drew, their executors, administrators, and assigns, shall and do permit and suffer the said Adam Ash and his assigns, to receive and take the residue and overplus of the said rents, issues, and profits of the premises, after full payment and satisfaction of the said annual sum of £ and all costs and expenses attending the execution of the aforesaid trusts, *or [*180] in relation thereto, to and for his and their own use and benefit.

Provided always, and it is hereby declared to be the true intent and meaning of the said parties hereto, that if at the time of the decease of either of them the said Adam Ash and Celia Brown, or at any time during their joint lives, there shall, through the wilful neglect or default of her the said Celia Brown, or her trustees or trustee, be more in arrear of the said annual sum of £ than two years' payment thereof, then, and in every such case, no further or other sum shall be raised to answer such arrears, than what shall amount in the whole to two years' payment of the said annual sum; and the residue of the said arrears shall sink into the inheritance of the same premises; and the said trustees, to whom the same premises are so limited, their executors, administrators, and assigns, shall thenceforth be freed, exempted, and discharged from the levying, raising, and payment of such residue of the said arrears.

Provided also nevertheless, that immediately after the decease of either of them the said Adam Ash and Celia Brown first dying, and after payment of all arrears (if any) of the said annual sum of £ (or of so much of such arrears as according to the proviso and declaration next hereinbefore expressed ought to be paid, in case of there being more in arrear than two years' [*181] *payment thereof), and when the said David Dun and Daniel Drew, and each of them, and their respective executors, administrators, and assigns, shall be fully reimbursed and satisfied all costs, charges, and expenses (if any) occasioned by, or relating to, the trusts of the said term of ninety-nine years (which they are hereby respectively empowered to raise by all or any

of the ways or means aforesaid, and to retain accordingly) ; then and immediately thenceforth, the said term of ninety-nine years of and in the said messuages, lands, tenements, hereditaments, and premises therein comprised, or so much thereof as shall remain undisposed of for the purposes aforesaid, shall cease, determine, and be utterly void to all intents and purposes whatsoever.

And as to, for, and concerning the said term of five hundred years hereinbefore limited in use to the said Edgar Edwards and Edmund Eames, their executors, administrators, and assigns as aforesaid, it is hereby agreed and declared, that the same is so limited to them upon the trusts, for the intents and purposes, and under and subject to the provisoes, declarations, and agreements hereinafter mentioned, expressed, and declared of and concerning the same ; (that is to say,)

Upon trust, in case the said yearly rent-charge or sum of £ , or any part thereof, shall be behind and unpaid by the space of forty days *next over, or after, [*182] any or either of the said days of payment, where- on the same is appointed to be paid as aforesaid (although no formal or legal demand thereof shall be made;) then, and so often, that they the said Edgar Edwards and Edmund Eames, or the survivor of them, his executors or administrators, shall and do from time to time, by and out of the annual rents, issues, and profits of the messuages, lands, tenements, hereditaments, and premises comprised in the same term of five hundred years, or by demising, leasing, selling, or mortgaging the same premises or any of them, or any part thereof, for all, or any part of, the same term, or by bringing actions against the tenants or occupiers of the same premises, or any of them, for the rents then in arrear, or by such other ways and means, as to them or him shall seem meet, raise and levy such sum or sums of money as shall be sufficient from time to time to pay and satisfy the said yearly rent-charge, or sum of £ , or so much thereof as shall from time to time happen to be in arrear and unpaid; together with all loss, costs, charges, damages, and expenses which the said Celia Brown, or her assigns, or the said Edgar Edwards and Edmund Eames, or the survi-

vor of them, his executors or administrators, or any of them shall sustain, expend, or be put unto, for or by reason of the non-payment of the same yearly rent-charge, or sum of £ , or any part thereof, at the days and times, and in manner hereinbefore appointed for the pay-
[*183] ment thereof; and shall *and do pay, apply, and dispose of the same moneys accordingly:

· And upon further trust, in case there shall be one or more child or children of the said intended marriage (other than, or not being an eldest or only son for the time being entitled, under the limitations hereinbefore contained, to the said messuages, lands, tenements, and hereditaments, either in possession or in remainder immediately expectant upon the decease of the said A. Ash,) that they the said Edgar Edwards and Edmund Eames, or the survivor of them, his executors or administrators, shall and do, after the decease of the said Adam Ash, or in the lifetime of the said Adam Ash with his consent, to be signified by some writing under his hand and seal (but subject and without prejudice to the raising and paying the said yearly rent-charge or sum of £ limited to the said Celia Brown for her life, and to such remedies for recovering the same as aforesaid,) by mortgage, sale, demise, or other disposition of the messuages, lands, tenements, hereditaments, and premises comprised in the said term of five hundred years, or of any part or parts thereof, for all or any part of the said term, or by and out of the rents, issues, and profits thereof, or by bringing actions against the tenants or occupiers of the same premises, or any of them, for the rents then in arrear, or by all or any of the said ways and means, or by such other ways and means as they the said Edgar [*184] Edwards and Edmund Eames, or the survivor of them, his executors or administrators shall think fit, raise and levy, or borrow and take up at interest, for the portion or portions of such child or children (other than, or not being an eldest or only son, for the time being, entitled as aforesaid,) the sum or sums of money hereinafter mentioned; (that is to say) if there shall be but one such child (other than, or not being an eldest or only son entitled as aforesaid,) the sum of four thousand

pounds of lawful money of Great Britain, as or for his or her portion ; and to be paid and payable to, and to become vested in, such child (be the same a younger son or a daughter) at or upon such age, day or time as the said Adam Ash by any deed or writing, with or without power of revocation and new appointment, to be sealed and delivered by him in the presence of and attested by, two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto shall direct or appoint ; and in default of such direction or appointment, or so far as any such direction or appointment shall not extend, to be an interest vested in such child, being a younger son, at his age of twenty-one years, or being a daughter, at her age of twenty-one years, or day of marriage (which shall first happen,) and to be paid to him or her at such age or time accordingly, if the same shall happen after the decease of the said Adam Ash ; but if the same shall happen in his lifetime, then the said portion shall be paid immediately after his decease, unless he shall signify his consent in *writing under his hand and seal, that the same [*185] shall be raised and paid in his lifetime, (but such payment in either case to be without prejudice as last aforesaid;) and if there shall be two such children and no more (other than, or not being an eldest or only son entitled as aforesaid,) then the sum of six thousand pounds of like lawful money for the portions of such children ; and if there shall be three or more such children (other than, or not being an eldest or only son, for the time being, entitled as aforesaid,) then the sum of eight thousand pounds of like lawful money for the portions of such three or more children : The said sum of money intended for the portions of such children (being more than one,) to be shared and divided between or among them in such parts or proportions, and to vest in, and be paid to, such children respectively at or upon such ages, days, or times, and to be subject to such charges, provisoies, and limitations for the benefit of or relating to some or one of them, and in such manner, as the said Adam Ash, by any deed or deeds, writing or writings, with or without power of revocation and new

appointment, to be by him sealed and delivered in the presence of, and to be attested by, two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, shall at any time or times direct or appoint; and in default of such last-mentioned direction or appointment, or so far as any such direction or appointment shall not extend, to be [*186] equally divided between or among *such children, if more than one, share and share alike; the share or shares of such of the said children, as shall be a younger son or sons, to become a vested interest or vested interests in him or them respectively, at his or their age or respective ages of twenty-one years; and the share or shares of such of them, as shall be a daughter or daughters, to become a vested interest or vested interests in her or them respectively, at her or their age or respective ages of twenty-one years, or day or respective days of marriage (which shall first happen,) and to be paid at such ages, days or times accordingly, if the same shall happen after the decease of the said Adam Ash; but in case the same shall happen in the life-time of the said Adam Ash, then such portions to be paid immediately after his decease, unless he shall signify such consent as aforesaid that the same or any of them shall be raised and paid in his life-time; but such payment in either case to be without prejudice as last aforesaid.

Provided always, and it is hereby agreed and declared between and by the said parties hereto, that in case any appointment shall be made in pursuance of the powers aforesaid, or either of them, which shall only extend to a part or parts of the sum of money, hereby intended for the portion or portions of such child or children as aforesaid, such appointment shall be valid and effectual notwithstanding the non-appointment of the remaining [*187] part or parts of such portion or *portions; but in that case any daughter or younger son entitled to a share under such appointment, shall be entitled to no further share of and in the remaining or unappointed part or parts of the moneys, hereby intended for portions as aforesaid, unless and until he or she shall have brought

his or her appointed share into hotchpot, and shall have accounted for the same accordingly, unless the said Adam Ash shall declare a contrary intention in writing.

And upon further Trust, that they the said Edgar Edwards and Edmund Eames, or the survivor of them, his executors or administrators, shall and do, after the decease of the said Adam Ash (without prejudice as last aforesaid, and also without prejudice to any such appointment as aforesaid to the contrary,) by and out of the annual rents, issues, and profits of the messuages, lands, tenements, hereditaments, and premises comprised in the said term of five hundred years, levy and raise for the maintenance and education of the child or children, for whom a portion or portions is or are hereby intended to be provided as aforesaid, such yearly sum and sums of money as hereinafter mentioned; (that is to say,) until such child or children shall respectively attain the age of twelve years, such yearly sum for such child or each of such children as will be equivalent to the interest of the portion hereby intended for him or her as aforesaid, after the rate of two pounds for every one hundred pounds by the *year; and from and [*188] after the age of twelve years, and until such portion or respective portions shall become payable, such yearly sum for each such child, as will be equivalent to the interest of the portion hereby intended for him or her as aforesaid, after the rate of four pounds for every one hundred pounds by the year; and also shall and do, at the discretion of such trustees or trustee, either themselves or himself pay and apply such sums for the maintenance and education of such child or children accordingly, or shall and do (if such trustees or trustee for the time being shall think proper,) pay such yearly sum or sums to the guardian or guardians for the time being of such child or children respectively, to be by such guardian or guardians applied for or towards the maintenance and education of such child or children respectively; and it is hereby agreed and declared, that such yearly sum or respective yearly sums for maintenance and education as aforesaid, shall be paid by half-yearly payments on the days following; (that is to say,) on the

day of and day of in each
and every year, by even and equal portions; the first
payment thereof to begin and be made on such of the
said days, as shall first happen after the decease of the
said Adam Ash.

Provided always, and it is hereby agreed and declared
between and by the said parties hereto, that if there
shall be two or more such children for whom portions
[*189] are hereby provided as aforesaid, *and any of
them, being a younger son or sons, shall depart
this life, or become an eldest or only son, entitled as
aforesaid, under the age of twenty-one years, or being a
daughter or daughters, shall depart this life under that
age, without being, or having been married; then and in
such case, and in default of and subject to any such ap-
pointment as aforesaid, the portion hereby intended to
be provided for each such daughter so dying, and for
each such son so dying, or becoming an eldest or only
son entitled as aforesaid, or so much thereof as shall not
be sooner advanced for any younger son or sons as here-
inafter mentioned, shall accrue and belong to the sur-
vivor or survivors, and other or others of such children
(other than, or not being an eldest or only son entitled
as aforesaid), and shall vest in, and be paid to him, her,
or them (if more than one), in equal parts and shares,
at or upon the same ages, days, and times respectively,
and in the same manner as is hereinbefore declared,
touching or concerning his, her, or their original portion
or portions, or as near thereto as circumstances will per-
mit; and such benefit of survivorship or accrue, shall
extend to the surviving or accruing as well as to the ori-
ginal portion and portions: But so nevertheless, that no
one child shall by survivorship or otherwise have, or be
entitled to, more than the sum of four thousand pounds
for his or her portion; nor any two children more than
the sum of six thousand pounds between them for their
portions.

*Provided always, and it is hereby agreed and
[*190] declared between and by the said parties hereto,
that it shall be lawful for the said Edgar Edwards and
Edmund Eames, and the survivor of them, his executors

or administrators, at any time or times in the lifetime of the said Adam Ash, with his consent, signified by some deed or deeds, writing or writings, to be sealed and delivered by him in the presence of, and to be attested by, two or more credible witnesses, and at any time or times after his decease, by and of the proper authority of the said Edgar Edwards and Edmund Eames, or the survivor of them, his executors or administrators, as they or he shall see occasion, or think fit, to levy and raise by all or any of the ways and means aforesaid (but subject nevertheless and without prejudice as aforesaid), any sum or sums of money, in part of the portion or portions hereby provided for, or which under the aforesaid power of appointment may be appointed to, such of the said children as shall be a younger son or sons; and to pay and apply the moneys, so to be raised as last aforesaid, for the purpose of placing and putting such younger son or sons, for whom, or in part of whose then apparent portion or portions the same shall be so raised, in or to any trade, business, profession, or employment, or for his or their instruction therein, or otherwise for his or their benefit or advancement in the world, notwithstanding his or their portion or portions shall not then have become payable as aforesaid; so nevertheless, [*191] *that such sum and sums of money, so to be raised as last mentioned, shall not exceed one-half part of the apparent portion or portions of such younger son or sons respectively; and shall go, and be considered, and taken as part of the portion or portions hereby provided for such son or sons, for whose benefit such sum or sums shall be raised as lastly mentioned.

And upon this further Trust, that they the said Edgar Edwards and Edmund Eames, and the survivor of them, his executors and administrators, do and shall permit and suffer the person or persons, to whom the next and immediate reversion or remainder expectant upon the determination of the said term of five hundred years of and in the premises therein comprised, shall for the time being belong, to receive the residue or surplus of the rents and profits, which shall remain after, and not be applied

in or towards the execution and performance of the trusts hereby declared of the same term.

Provided always, That no demise, sale, or mortgage, shall be made for raising such portion or portions as aforesaid, until some one of the said portions shall become payable under or by virtue of the trusts aforesaid, unless with the consent of the said Adam Ash, testified as aforesaid, or unless the same shall be made for the purpose of raising any sum or sums of money for the [*192] advancement of a younger son or sons, pursuant *to the power or authority hereinbefore in that behalf contained.

Provided also, and it is hereby agreed and declared between and by the said parties hereto, that in case the said Adam Ash shall, in his lifetime, give or advance any sum or sums of money for or towards the preferment or advancement of any of the said children, being a younger son or sons, in the way of, or for the placing him or them in any profession, business, or employment, or for his or their instruction therein, or otherwise for his or their benefit, or being a daughter or daughters in marriage; then and in such case, if any such sum or sums of money so to be advanced, shall be equal to, or exceed the portion or portions hereinbefore intended to be provided for such child or children respectively, such advanced sum or sums shall be accounted in full for the portion or portions so as aforesaid hereinbefore provided for such child or children respectively; but if such advanced sum or sums shall be less than the portion or portions hereinbefore provided or intended for such child or children respectively, then such advanced sum or sums shall be accounted as part of the portion or portions so as aforesaid hereinbefore provided or intended for such child or children respectively; and in case any child or children shall be so advanced as aforesaid by the said Adam Ash, he the said Adam Ash shall (unless he shall declare a [*193] contrary intention in writing) stand in the place of the child or children so advanced as aforesaid in respect of the sum or sums of money so by him given by way of advancement as aforesaid, and to the extent

of such advancement shall be considered as a purchaser of the share or shares of such child or children.

Provided also, and it is hereby further agreed and declared, That when the trusts hereinbefore declared of and concerning the said term of five hundred years shall have been executed and performed, or satisfied, or shall have become unnecessary, or incapable of taking effect, and the costs and charges (if any) of the trustees of the same term, their executors and administrators, in and about the execution and performance of the same trusts, shall have been fully paid and satisfied (and which they are hereby respectively authorised and empowered to levy and raise by all or any of the ways and means aforesaid, and to retain accordingly); then and immediately thenceforth the said term of five hundred years of and in the premises therein comprised, or so much thereof as shall remain unsold and undisposed of for the purposes aforesaid, shall cease, determine, and be utterly void to all intents and purposes whatsoever.

Provided always, and it is hereby agreed and declared, that it shall and may be lawful to and for the said Adam Ash, from time to time during his life, and after his decease, then to and for the *guardian or guardians [*194] for the time being of any child or children of the said Adam Ash, on the body of the said Celia Brown to be begotten, who by virtue of, or under the limitations hereinbefore contained, shall be entitled to the possession or receipt of the rents and profits of the hereditaments and premises hereby granted and released, or intended so to be, from time to time, during the minority or respective minorities of such child or children to demise or lease all or any part or parts of the hereditaments and premises hereby granted and released, or intended so to be, with the appurtenances, to any person or persons, for any term or number of years, not exceeding twenty-one years in possession, and not in reversion, or by way of future interest; so that there be reserved and made payable on every such lease, during the continuance thereof, the best and most improved yearly rent or rents, to go along with, and be incident to, the immediate reversion or remainder of the premises so to be leased, that

can or may be reasonably had or gotten for the same, without taking any fine, premium, or foregift, for the making thereof; and so that in every such lease there be contained a condition of re-entry on the non-payment of the rent or rents to be thereon or thereby respectively reserved, by the space of twenty-one days next after the same shall become due and payable; and so that the lessee or the respective lessees, to whom such lease or leases shall be made, seal and deliver a counterpart or [*195] counterparts of such lease or *leases; and so that none of the lessees, to whom any such lease or leases shall be made, be, by any clause or words therein contained, authorised to commit waste, or exempted from punishment for committing waste; any thing herein contained to the contrary thereof notwithstanding.

Provided always, and it is hereby agreed and declared between and by the said parties to these presents, that it shall and may be lawful to and for the said Cornelius Crosby and Charles Crompton, and the survivor of them, and the heirs of such survivor, and they and he are hereby authorised and empowered, at any time or times after the solemnization of the said intended marriage, at the request, and by the direction of the said Adam Ash and Celia Brown during their joint lives, and in case the said Celia Brown shall depart this life in the lifetime of the said Adam Ash, then at the request and by the direction of him the said Adam Ash during his life (such request and direction to be testified by some writing or writings under the hands and seals of the said Adam Ash and Celia Brown, or under the hand and seal of the said Adam Ash, in case he shall be the survivor of them,) to make, sale, alien, and dispose of, or to convey in exchange for, or in lieu of, other messuages, lands, or hereditaments, to be situate somewhere in that part of Great Britain called England, or in Wales, all or any part of the hereditaments hereby granted and released, or intended so to be, with the appurtenances, *and the [*196] inheritance thereof in fee-simple, to any person or persons whomsoever, either together or in parcels, and for such price or prices in money, or for such equivalent or recompense in messuages, lands, or hereditaments, as

to them the said Cornelius Crosby and Charles Crompton, or the survivor of them, or his heirs, shall seem reasonable; and for the intents and purposes aforesaid, or any of them, it shall and may be lawful to and for the said Cornelius Crosby and Charles Crompton, and the survivor of them, and the heirs of such survivor, at such request, and by such direction, and so testified as aforesaid, by any deed or deeds, writing or writings, to be by them the said Cornelius Crosby and Charles Crompton, or the survivor of them, or his heirs, sealed and delivered in the presence of, and attested by, two or more credible witnesses, to revoke, determine, and make void all and every the uses, estates, trusts, limitations, powers, provisoess, and agreements hereinbefore limited, expressed, declared, and contained, of and concerning the hereditaments so to be sold or exchanged, or any part thereof; and by the same, or any other deed or deeds, writing or writings, to be by him or them sealed and delivered, and attested as aforesaid, to limit and appoint, direct and declare, such use or uses, estate or estates, trust or trusts of the hereditaments, the uses whereof shall be so revoked, which it shall be thought necessary or expedient to limit, declare, or appoint in order to effect such sale, exchange, or disposition as *aforesaid; and that upon any such exchange as [*197] aforesaid, it shall and may be lawful for the said Cornelius Crosby and Charles Crompton, or the survivor of them, or his heirs, to receive or take any sum or sums of money by way of equality of exchange; and also upon receipt of any money to arise by such sale of the said hereditaments, or any part thereof, or to be received or taken for, or by way of, equality of exchange, it shall and may be lawful to and for the said Cornelius Crosby and Charles Crompton, or the survivor of them, or his heirs, to give and sign receipts for the money, for which the same shall be so sold, or so to be paid for equality of exchange; which receipts shall be sufficient discharges to the person or persons paying the same respectively, for the money for which the same shall be so given, or for so much thereof as in such receipts shall be respectively acknowledged or expressed to be received; and that the person or persons paying the same respectively,

and taking such receipt or receipts for the same as aforesaid, shall not afterwards be obliged to see to the application, or be in any wise answerable or accountable for any loss, misapplication, or non-application of such money, or any part thereof: Provided nevertheless, and it is hereby also agreed and declared between and by the said parties hereto, that when all or any part or parcel, or parts or parcels, of the said hereditaments hereby made saleable as aforesaid, shall be sold in pursuance of these presents for a valuable consideration in money, [*198] *and also when any sum or sums of money shall be received for equality of exchange in pursuance of the power for that purpose hereinbefore contained; then they the said Cornelius Crosby and Charles Crompton, or the survivor of them, or his heirs, shall with all convenient speed (with the consent of the said Adam Ash and Celia Brown during their joint lives, or if the said Adam Ash shall survive the said Celia Brown, then with the consent of the said Adam Ash during his life, to be testified by writing under their or his hands or hand, and after the decease of the said Adam Ash, then with the consent in writing of the person or persons, who would, under or by virtue of the limitations hereinbefore contained, or to be contained or referred to in the settlement or conveyance hereinafter directed, or any of them, be for the time being in the actual possession, or entitled to the receipt of the rents and profits of the hereditaments to be purchased as hereinafter is mentioned or directed, in case the same were then actually purchased, if such person or persons be of full age, but if not, then with the consent in writing of the guardian or guardians for the time being of such person or persons respectively) lay out and invest^s all and every the sum and sums of money, which shall arise by such sale or sales, and be paid for equality of exchange as aforesaid, in the purchase of other messuages, lands, or hereditaments in [*199] possession, to be *situate, being, or arising somewhere in that part of Great Britain called England, or in Wales, of a clear and indefeasible estate of

* See vol. i. 488, note 3.

inheritance in fee-simple (whereof any part, not exceeding one-fourth part in any one purchase, may, if the parties interested shall think fit, be copyhold of inheritance); and that as well the hereditaments so to be purchased, as all and every the hereditaments so to be received in exchange as aforesaid, shall thereafter forthwith be settled, conveyed, and assured to, for, and upon such uses, trusts, intents, and purposes, and with, under, and subject to such powers, provisoies, conditions, and agreements, as are in and by these presents limited, expressed, declared, and contained, of and concerning the hereditaments hereby granted and released, or intended so to be, or as near thereto as the deaths of parties, and other contingencies, or the circumstances of the case, will then permit: Provided always, and it is hereby further agreed and declared between and by the said parties to these presents, that in the mean time, and until the money to arise by such sale or sales, or to be received for equality of exchange as aforesaid, shall be laid out and invested in a purchase or purchases in the manner hereinbefore mentioned, it shall and may be lawful to and for the said Cornelius Crosby and Charles Crompton, and the survivor of them, and the heirs of such survivor, by and with the consent and approbation of the said Adam Ash and Celia Brown, or of the survivor of them, to be testified as last mentioned, [*200] *and from and after the decease of such survivor, then by and of the proper authority of the said trustees or trustee for the time being, from time to time to place out and invest such sum or sums of money, in their or his own names or name, in the public stocks or funds, or at interest upon government or real securities in England or Wales; and from time to time, with such consent, and so testified as aforesaid, or of their or his own proper authority, as the case shall happen, to alter, vary, sell, transfer, and dispose of such stocks, funds, or securities, and again to lay out and invest the money arising by such alteration, sale, transfer, or disposition, upon new or other stocks or funds, or at interest upon government or real securities of the like nature, as often as they shall think proper; and the interest, dividends, and annual

proceeds arising from such stocks, funds, or securities, shall from time to time go and be paid to such person or persons, and be applied to such uses, intents, and purposes, and in such manner as the rents and profits of the hereditaments to be purchased therewith would go and be payable or applicable, in case such purchase or purchases were actually made.

Provided always, and it is hereby also agreed and declared, that in case the trustees in and by these presents nominated and appointed, or any of them, or any succeeding or other trustees or trustee of the said trust estate and [*201] premises, to *be nominated as hereinafter mentioned, or their or any of their heirs, executors, or administrators, shall happen to die, or be desirous to be discharged of and from, or refuse or become incapable to act in the trusts or powers hereinbefore expressed, declared, and contained, before the same trusts shall have been fully performed, exercised or satisfied, then and so often as the same shall happen it shall and may be lawful for the said Adam Ash and Celia Brown, during their joint lives, and after the decease of either of them, to and for the survivor of them, during his or her life, and after the decease of such survivor, then to and for the surviving, or continuing, or other trustee or trustees of the premises, the trustee or trustees of which shall so die, desire to be discharged, or refuse, or become incapable to act as aforesaid, by any deed or writing under their, his, or her hands and seals, or hand and seal, to nominate, substitute, and appoint any other person or persons to be a trustee or trustees in the place and stead of such trustees or trustee so dying, desiring to be discharged, or refusing or becoming incapable to act as aforesaid ; and that when and so often as any such new trustees or trustee shall be nominated and appointed as aforesaid, all the said trust estate and premises, the trustee or trustees whereof shall so die, desire to be discharged, or refuse, or become incapable to act as aforesaid, shall be thereupon with all convenient speed conveyed, transferred, assigned, and assured [*202] respectively (according to the nature *and tenure thereof) in such sort and manner as that the same shall and may be legally and effectually vested in the

newly appointed trustee or trustees jointly with such of the former trustees, as shall be willing and capable to act ; or in case there shall be no continuing former trustee, then in such newly appointed trustee or trustees only ; To, for, and upon the uses, trust, intents, and purposes hereinbefore limited, expressed, declared, and contained of and concerning the same ; and that the new trustee or trustees, who shall be appointed in the room or stead of the said Cornelius Crosby and Charles Crompton, or either of them, or of any trustees or trustee succeeding them or either of them as aforesaid, either alone or jointly with such of them the said Cornelius Crosby and Charles Crompton, or of such succeeding trustees or trustee as shall continue to act, shall and may, either before or after any such conveyance or assurance as last aforesaid, exercise all or any of the powers or authorities hereinbefore reserved or given to the said Cornelius Crosby and Charles Crompton, or the survivor of them, or the heirs, executors, or administrators of such survivor as aforesaid ;^{*} and that every such new trustee shall and may in all things, and in all respects, act and assist in the management, carrying on, and executing of the trusts, to which he shall be so appointed, as fully and effectually, and with the same powers and authorities as if such new trustee had been originally by these presents *nominated [*203] and appointed, and as the trustee in or to whose place he shall come or succeed might or could have done, or have been invested with, under or by virtue of these presents, if then living and continuing to act.

Provided also, and it is hereby further agreed and declared between and by the said parties hereto, that the said several trustees in and by these presents nominated and appointed, and hereafter to be nominated and appointed by virtue of the said last-mentioned power, and each and every of them, their and each and every of their heirs, executors, administrators, and assigns, shall be charged and chargeable only for so much money as they or he shall respectively actually receive, by virtue of, or under, these presents, or the trusts or powers aforesaid,

* See vol. i. 506.

notwithstanding their joining in receipts for the sake of conformity ; and that any one or more of them shall not be answerable for the other or others of them, nor for the acts, receipts, neglects, or defaults of the other or others of them ; but each of them for his own acts, receipts, neglects and defaults only : nor shall they, or any of them, be answerable or accountable for any person or persons, who is, are, or shall be the receiver or receivers of the rents and profits of the said hereditaments and premises, or any of them, or any part thereof, or in whose hands the same rents and profits, or any of the aforesaid trust moneys, shall or may be deposited or lodged for [*204] *safe custody ; nor for the insufficiency or deficiency of title of or to any manors, lands, or hereditaments, which may be had or received by way of exchange, for or in lieu of all or any part of the messuages, lands, tenements, and hereditaments hereby made saleable and exchangeable as aforesaid, or which may be purchased with the money to arise by sale thereof, in case the same shall be sold as aforesaid ; nor for the insufficiency or deficiency of any security or securities, in or upon which the moneys to arise by such sale or sales, or to be received for equality of exchange, or any part thereof, shall or may be placed out or invested as aforesaid ; nor for any misfortune, loss, or damage, which may happen in the execution of any of the aforesaid trusts or powers, or in relation thereto, except the same shall happen by or through their own wilful neglects or defaults respectively ; and also that the said several trustees, and each and every of them, their and each and every of their heirs, executors, administrators, and assigns, shall and may, by and out of the moneys, which shall come to their respective hands by virtue of these presents, or the trusts or powers aforesaid, retain to, and reimburse themselves respectively, and also allow to their and his co-trustee and co-trustees, all loss, costs, damages, and expenses, which he or they or any of them shall or may respectively suffer, sustain, expend, disburse, be at, or be put unto, or which shall or may be to him, them, or any of them occasioned, for or on account, or by reason [*205] *or means, of the trusts hereby in them reposed,

or the management and execution thereof, or otherwise howsoever relating thereto.

And the said Adam Ash, for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree with and to the said Cornelius Crosby and Charles Crompton, their heirs, cestuis que use, and assigns, in manner following; (that is to say,) That (for and notwithstanding any act, deed, matter, or thing whatsoever, made, done, committed, executed, or suffered by him the said Adam Ash, or any of his ancestors, to the contrary) he the said Adam Ash, now at the time of the sealing and delivery of these presents, is lawfully and rightfully seised of, or otherwise well and sufficiently entitled to, the said messuages or tenements, lands and hereditaments hereby granted and released, or expressed, or intended so to be, and of and to every of them, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, for an absolute and indefeasible estate of inheritance in fee-simple in possession: And also, that he the said Adam Ash (for and notwithstanding any such act, matter, or thing as aforesaid) now at the time of the sealing and delivery of these presents, hath in himself good right, full power, and lawful and absolute authority to grant, bargain, sell, release, and assure the messuages, lands, tenements and hereditaments hereby granted and released, or expressed, or *intended so to be, and every of them, and [*206] every part and parcel thereof, with their and every of their rights, members, and appurtenances, unto the said Cornelius Crosby and Charles Crompton, their heirs and assigns, to, for, and upon the uses, trusts, intents, and purposes, and in manner and form aforesaid, according to the true intent and meaning of these presents; And likewise, that the messuages, lands, tenements, and hereditaments hereby granted and released, or expressed, or intended so to be, and every of them, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, shall and lawfully may from time to time, and at all times hereafter, remain, continue, and be, to, for, and upon the several uses, trusts, intents, and purposes hereinbefore

limited, expressed, and declared of and concerning the same, and shall and may be peaceably and quietly had, held, and enjoyed, and the rents and profits thereof received and taken accordingly, without the let, suit, trouble, denial, eviction, ejection, disturbance, molestation, hindrance, interruption, claim, or demand whatsoever of, from, or by the said Adam Ash, or his heirs, or any person or persons claiming, or to claim, by, from, through, under, or in trust for him, them, or any of them; or any of his ancestors; and that free and clear, and freely, clearly, and absolutely acquitted, exonerated, and discharged, or otherwise by him the said Adam Ash, his heirs, executors, or administrators, or some or one of them, well and sufficiently *saved, defended, kept [*207] harmless and indemnified of, from, and against all former and other gifts, grants, bargains, sales, leases, mortgages, jointures, dowers, right and title of dower, uses, trusts, wills, intails, statutes, recognizances, judgments, extents, executions, rents, arrears of rents, annuities, debts, legacies, sum and sums of money, estates, titles, troubles, charges, and incumbrances whatsoever, made, done, or committed by the said Adam Ash, or any of his ancestors, or any person or persons claiming, or to claim, by, from, or under him, or them, or any of them; And moreover, that he the said Adam Ash, and his heirs, and every other person having, or lawfully or equitably claiming, or who shall or may at any time or times hereafter have, or lawfully or equitably claim any estate, right, title, or interest whatsoever, in, to, or out of the messuages, lands, tenements, and hereditaments hereby granted and released or expressed, or intended so to be, or in, to, or out of any of them, or any part or parcel thereof by, from, under, or in trust for him or them, or any of them, or any of his ancestors, shall and will, from time to time, and at all times hereafter, upon every reasonable request of the said Cornelius Crosby and Charles Crompton, their heirs or assigns, but at the proper costs and charges in the law of the person or persons for the time being, beneficially entitled to the premises, make, do, acknowledge, and execute, or cause and procure to be made, done, acknowledged, and executed,

all such further and other *lawful and reasonable acts and things, deeds, conveyances, and assurances in the law, whatsoever, for the further, better, more perfectly and absolutely granting, releasing, and assuring the messuages, lands, tenements, and hereditaments hereby granted and released, or expressed, or intended so to be, and every of them, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, to, for, and upon the several uses, trusts, intents, and purposes, and under and subject to the several powers, provisoos, declarations and agreements hereinbefore limited, expressed, declared, and contained of and concerning the same, or such of them as shall be then subsisting, undetermined, or capable of taking effect; as by them the said Cornelius Crosby and Charles Crompton, their heir or assigns, or any of them, their or any of their counsel in the law, shall be reasonably devised, or advised, and required.⁷

In witness, &c.

⁷ [If protectors of the settlement are to be appointed, the appointment may be as follows :

And whereas under the provisions of the act of parliament for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance, the said Adam Ash would, in default of any appointment to the contrary, be the protector of the settlement hereby made. And whereas the said Adam Ash hath resolved to appoint the said A. B., C. D., and E. F., to be the protector of the settlement hereby made in lieu of him the said Adam Ash, in manner hereinafter mentioned. Now this Indenture lastly witnesseth, that in pursuance and under and by virtue of the power for this purpose contained in the said last-mentioned act of parliament, the said Adam Ash doth hereby nominate and appoint the said A. B., C. D., and E. F., to be protector of the settlement hereby made in lieu of him the said Adam Ash for and during the natural life of him the said Adam Ash, with all such powers, authorities, and discretion as in and by the same last-mentioned act of parliament are given to or vested in the protector of any settlement. Provided always, and it is hereby agreed and declared, that in case the said A. B., C. D., and E. F., or any or either of them, or any of their successors to be appointed as hereinafter mentioned, shall die or shall by deed relinquish their or his office of protector, then and in such case it shall be lawful for the surviving or continuing protector or protector, during the life of the said Adam Ash, by any deed or deeds duly executed, to appoint any one person, or number of persons *in esse*, and not being an alien or aliens, to be protector of the settlement hereby made during the life of the said Adam Ash, in the place of any one person or number of persons who shall so die or relinquish his or their office of protector as aforesaid; and that when and so often as any person or persons shall be appointed protector as aforesaid, such person or persons shall be protector of the settlement hereby made in case there shall be no other protector; but if there shall then be any other person or persons protector of the settlement hereby made, then joint protector with such other person or persons. Provided nevertheless, that by virtue or means of any appointment to be made, under the power lastly hereinbefore contained, the number of persons composing the protector of the settlement hereby made shall never exceed three.]

*The following are Extracts from a Deed prepared by the late Mr. Booth, and alluded to in the Opinion stated in Appendix VII., Vol. I.

THIS Indenture, &c., 1772.

Between the right honourable P., Earl of H., and the most honourable Jemima, Marchioness G., his wife, of the first part, the right honourable the Lady Annabella G., the eldest daughter of the body of the said J., Marchioness G., begotten by the said Earl of H., of the second part, the right honourable lady M. J. G., the second and youngest daughter of the body of the said J., Marchioness G., begotten by the said Earl of H., of the third part, J. V., of &c. of the fourth part, J. E. of &c. of the fifth part, J. J. and D. W. of the sixth part, the right honourable W. E. and E. H. of the seventh part, and the right honourable J., Lord B. of the eighth part; the deed recites

An Indenture dated the 26th of June, 1736; whereby the reversion in fee, to take effect after failure of issue male of the Duke of K., of and in certain manors, &c. in the said counties of were conveyed by H., Duke of K., to the use of the said Marchioness G. and her assigns for her life; with remainder to trustees [*211] to preserve contingent remainders; with remainder *to the first and other sons of the said Lady G. successively in tail general; with remainder to her first and other daughters successively in tail general; with divers remainders over. And also recites the articles on the marriage of the said J. Marchioness G., only child of J., Lord G., and Lady A., his wife, with the said P., Earl of H., dated the 19th May, 1740; whereby (amongst other things) the Duke of K. covenants that he will, by his will or otherwise, give his personal estate, and the moneys to arise by sale of certain real estates, to be laid out in lands to be settled to the use of the said duke for his life, with remainder to trustees to preserve contingent remainders, with remainder to his first and other sons in tail male, with remainder to the said Mar-

chioness G. for her life, with remainder to trustees to preserve contingent remainders; with remainder to trustees for the term of five hundred years in trust to raise 800*l.* per annum for the said Lord H. for his life, and for younger children's portions; with like remainders over, as in the said Indenture of the 26th June, 1736: it also recites

The death of the Duke of K. on the 22d day of, &c., without issue male; and

The will of the said Duke of K., whereby he devises his Herefordshire estates to be sold; and the money arising by the sale thereof, and the residue of his personal estate, after payment of his debts, &c., to be laid out in the purchase of *lands, to be settled to the same uses as are mentioned in the same indenture of the 26th June, 1736; and the deed also recites

Several codicils to the said will, and

An act of parliament of the 15 and 16 Geo. II. for carrying the said articles into execution; and also,

Indentures of lease and release of 11th and 12th of, &c., whereby several estates in the county of B., purchased with the money arising by sale of the duke's Herefordshire estates, were settled to the uses mentioned in the said duke's will.

"And whereas there is not any issue male of the body of the said J. Marchioness G., and therefore they the said P., Earl of H., J. Marchioness G., and the said Lady Annabella G., the eldest daughter of the said J. Marchioness G., who has attained her age of twenty-one years, as hereinbefore is mentioned, are desirous of suffering common recoveries, as well of the said several manors, messuages, lands, and hereditaments, comprised in the said recited Indenture of the 26th of June, 1736, and in the will of the said D. of K., as of the several hereditaments and premises so purchased with the said trust-moneys as aforesaid, and comprised in the said last-recited indentures of lease and release, and of barring the estate tail so vested in the said Lady Annabella G., and all the *remainders over, and the reversion and remainder in fee, which was so limited to the right heirs of the said H., late D. of K.; but without

prejudicing or disturbing any of the precedent uses, estates, or charges, in and by the said indenture of the 26th of June, 1736, and the said will and codicils, or the said recited act of parliament, or the said recited indenture of the 12th day of, &c., now last past, or any of them, expressly or by reference limited, created, or declared, prior to, or before, the said remainder or limitation to the first daughter of the body of the said J. Marchioness G., by the said Earl of H. (party hereto) begotten, or prior to, or before, the said remainder or limitation to the said Lady Annabella G., and the heirs of her body lawfully issuing, and without prejudicing, or disturbing, any of the powers or privileges to the said precedent uses or estates annexed or belonging; all which precedent uses, estates, powers, and privileges, are intended to be corroborated and confirmed by the common recoveries so intended to be suffered.

"And whereas it hath been agreed by and between the said P. Earl of H., J. Marchioness G., and Lady Annabella G., that in case the said Lady A. G. shall happen to marry during the joint lives of the said P. Earl of H., party hereto, and J. Marchioness G., and that the said P. Earl of H. shall and do previously to and upon such marriage of the said Lady A. G., settle and secure to the good liking of the said Lady A. G., and of such [*214] *husband as she shall marry, an annuity or yearly rent-charge of 1,500*l.*, to be paid and payable to the said Lady A. G. and her assigns during the joint natural lives of the said J. Marchioness G. and Lady A. G., as and for or towards a provision for the immediate support and maintenance of the said Lady A. G., during the lifetime of the said Marchioness G. her mother; then and in such case, and in consideration thereof, the hereditaments and premises hereby released shall, from and after the decease of the said J. Marchioness G., stand and be charged and chargeable with so much of the sum of 10,000*l.* or 20,000*l.*, as the case shall happen, by the said recited act of parliament charged on, and to be raised and paid out of, the real estates in the same act mentioned, and late of the said P. Earl of H. deceased, for the portion or portions of the younger child or chil-

dren of the said P. Earl of H. party hereto, on the body of the said J. Marchioness G. begotten or to be begotten, as he the said P. Earl of H. party hereto, by any deed or deeds, writing or writings, with or without power of revocation, to be by him sealed and delivered in the presence of, and attested by, two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils, to be by him signed in the presence of and attested by three or more credible witnesses, shall declare, direct, or appoint, as an equivalent or satisfaction for so much of the said sum of 10,000*l.* or 20,000*l.* (*as the case shall happen*), as shall be raised and paid out of the *said real estates late of the said P. Earl of H., deceased, for the portion or portions of such younger child or children. And it hath been also further agreed, that the hereditaments herein by these presents granted and released shall be charged with such yearly sum or sums of money, not exceeding in the whole the sum of 300*l.* as hereinafter mentioned.

" Now this Indenture witnesseth, that in order to bar, dock, and destroy the said estate tail in remainder now vested in the said Lady Annabella G., and all other estates tail and remainders subsequent thereto, in and by the said indenture of the 26th of June, 1736, and the said will and codicils of the said H., late Duke of K., and the said hereinbefore recited acts of parliament, and the said recited articles of agreement executed previous to the marriage of the said Earl of H., party hereto, with the said J. Marchioness G., and the said indenture of release of the 12th day of, &c. now last past, or any of them, or otherwise, expressly, or by reference, or equitably, limited, created, and declared, and all remainders, or reversions thereupon expectant or depending, of and in the several manors and sites of manors, &c., herein-after by these presents granted, bargained, sold, released, and confirmed, or intended so to be (but without prejudicing or disturbing the said uses, estates, and charges, prior or precedent to the said remainder in tail, now vested in the said Lady Annabella G. as aforesaid, *or any of the powers or privileges to the precedent uses or estates, or any of them, annexed [*216]

or belonging); And to the intent that the same manors, &c., with the appurtenances (but subject and without prejudice to the uses, estates, and charges, prior and precedent to the said remainder in tail, now vested in the said Lady A. G. and the powers thereto annexed or belonging), may be assured and limited to such uses, upon such trusts for such intents and purposes, and by, with, and under such limitations, powers, provisoies, and charges as are hereinafter mentioned and declared of and concerning the same," and also in consideration of 10s., &c., and for divers other good causes and valuable considerations, the said Earl of H., party to these presents, J. Marchioness G., and Lady A. G. hereunto moving; "They the said P. Earl of H., J. Marchioness G., and Lady Annabella G., have, and each of them hath, granted, bargained, sold, aliened, released, and confirmed, and by these presents do, and each of them doth grant, bargain, sell, alien, release, and confirm unto the said J. N." (in his actual possession, &c.), and to his heirs all, &c.

To have and to hold the said hereditaments and premises, &c. unto and to the use of the said J. N. and his heirs during the joint lives of the said J. Marchioness G. and J. N.

"And it is hereby declared and agreed to be the true intent and meaning of these presents, *and of all [*217] the said parties hereunto, that the said J. N., and his assigns, shall stand and be seised of the said several manors and sites of manors, capital and other messuages, farms, rectories, advowsons, tithes, lands, tenements, rents, hereditaments, and premises hereby released, or intended so to be, with their and every of their rights, members, and appurtenances, for and during the joint natural lives of the said J. Marchioness G. and J. N. aforesaid, to and for the end, intent, and purpose that he the said J. N. by virtue of these presents may be and become perfect tenant of the immediate freehold of the said manors, &c., in order that eight or more good and perfect common recoveries, one or more for each of the said counties of B., &c., may be perfected, suffered, and executed thereof, in manner hereinafter mentioned; for

which purpose it is hereby covenanted, concluded, declared, and agreed, by and between the said parties to these presents, that it shall and may be lawful to and for the said J. E., at the cost and charges of the said Earl of H., before the end of T. Term next ensuing the date of these presents, to sue forth out of his Majesty's High Court of Chancery, and prosecute against the said J. N., one or more writ or writs of entry, sur disseisin en le post returnable and to be returned before the justices of his Majesty's Court of Common Pleas at Westminster, thereby demanding, by apt and convenient names, quantities, and qualities of land, number of messuages and acres, and other proper descriptions, the said [*218] *manors, &c., hereby granted and released, or intended so to be, with their, and every of their, rights, members, and appurtenances; to which said writ or writs the said J. N. shall appear gratis in his proper person, and vouch to warranty the said Lady Annabella G., who shall appear in her proper person, or by attorney lawfully authorized in that behalf, and enter into the said warranty, and she shall vouch over to warrant the same premises the common vouchee of the said Court of Common Pleas, who shall thereupon appear and imparl, and after imparlance had shall make default, and depart in contempt of the said Court; and such further and other proceedings shall be had on the said writ or writs, as that eight or more common recoveries, one or more for each of the said counties of B., &c., shall be thereupon had and suffered of the said manors and premises hereby granted and released, or intended so to be, with their, and every of their rights, members, and appurtenances, according to the form and effect of common recoveries for assurance of lands in such cases had and accustomed; and it is hereby concluded, declared, and agreed upon by and between all and every the said parties to these presents, that from and immediately after such time or times as the said common recoveries, or any of them, shall be had, executed, perfected, and suffered as aforesaid, the said common recoveries in manner aforesaid, or in any other manner, or at any other time or times, to be had, per-

[*219] fected, executed, and suffered, *of the said manors and hereditaments, and each and every of the said common recoveries, as to the hereditaments to be comprised therein respectively, and the full force and execution thereof, and of these presents, and the grant and release herein contained, and all and every other common recovery and recoveries, and other assurances in the law whatsoever of the said manors, &c., hereby granted and released, or any of them, or any part or parts thereof, had, suffered, and executed, or to be had, suffered, and executed, by, or between, the said parties hereto, or any of them, or whereunto they or any of them, are, is, or shall be, party or parties, privy or privies, as to all the said hereditaments and premises hereinbefore by these presents granted and released, or intended so to be, and as to every part and parcel thereof, with their, and every of their, rights, members, and appurtenances shall be and enure, and the recoveror or recoverors in such common recoveries named or to be named, and his or their heirs shall stand and be seised of the said manors, &c., hereby granted and released, or intended so to be, with their and every of their rights, members, and appurtenances:

"In the first place for corroborating, strengthening, and confirming the said several uses, estates, terms of years, and charges, in and by the said hereinbefore recited indentures, will, codicils, articles of agreement, and acts of parliament, or any of them, expressly or by reference, [*220] *limited, created, and declared, precedent to, or before, the limitation to the first daughter of the body of the said J. Marchioness G. begotten, and the heirs of her body issuing, or precedent or prior to the said limitation to the said Lady Annabella G. and the heirs of her body lawfully issuing or to be begotten, and for corroborating, strengthening, and confirming the several powers and privileges to the same precedent uses, estates, terms of years, and charges, and every or any of them, belonging or annexed: And from and immediately after the determination of the said several precedent uses, estates, and charges, and as the same shall severally end and determine, and subject to the said precedent uses, estates, and charges, and every of them, and with-

out prejudice to them, or any of them, to such uses, upon such trusts, for such intents and purposes, and subject to such provisoes, charges, conditions, and agreements, as are hereinafter expressed and declared of and concerning the same ; (that is to say,) To the use of such person and persons, in such order and manner, and to, for, and upon, such estate and estates, uses, trusts, intents, and purposes, and with, upon, under, and subject to such powers, provisoes, conditions, and restrictions, and with such remainders or limitations over, and charged and chargeable with such yearly and gross sum and sums of money, and in such manner, as the said P. Earl of H. party hereto, J. Marchioness G., and Lady Annabella G., at any time or times hereafter, during their *joint [*221] natural lives, by any deed or deeds, writing or writings, with or without power of revocation, to be by them, and each and every of them, sealed and delivered in the presence of, and attested by, two or more credible witnesses, shall jointly direct, limit, and appoint : And in default of such joint direction, limitation, and appointment, and in the meantime, and until such joint direction, limitation, and appointment shall be so made and executed, and until the estate or estates, interest or interests, charge or charges, thereby to be directed, limited, and appointed, shall commence and take effect, and also subject to any such direction, limitation, or appointment, as shall be so made, where the same shall not happen to be a complete and entire appointment, direction, and limitation, of and concerning the whole of the said manors, &c., and of and concerning the whole estate and interest therein, and as to such and so many of the said hereditaments and premises hereinbefore by these presents granted and released, as shall remain unappointed, or concerning which no complete direction, limitation, or appointment, shall be made, and as and when the uses, estates, and charges therein, or thereupon, or in or upon any part or parts thereof, to be directed, limited, or appointed, shall end and determine," To the use of the said E. E. and E. L. for 700 years, to commence from the death of the Marchioness G., with remainder to Lady A. G. for life ; with remainder to trustees, to preserve &c. ; with re-

[*222] mainder to her first and *other sons successively in tail : with remainder to her first and other daughters successively in tail : with divers remainders over ; and the ultimate remainder to the right heirs of the said D. of K., deceased.

“ Provided always, and it is hereby agreed and declared between and by the said parties to these presents, that if the said J. N. shall not pay to the said P. Earl of H. and J. Marchioness G. or the survivor of them, the sum of £100,000 of lawful money of Great Britain, on or before the first day of August next ensuing the day of the date of these presents, then, and in such case, the said grant, and release, so hereby made, shall as to all and every of the said hereditaments before by these presents granted and released, or intended so to be, with their and every of their appurtenances, cease, determine, and be absolutely null and void ; and it shall be lawful for the said P. Earl of H. and J. Marchioness G. in case she shall survive the said Earl of H. to enter on, and hold and enjoy, all and every of the said premises hereinbefore by these presents granted and released, with their appurtenances, as in their or her former estate, anything hereinbefore contained to the contrary thereof in any wise notwithstanding.”⁸

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* P A R T I T I O N.

THIS Indenture, made &c. (in pursuance, &c.) between R. B. of &c. and G. his wife, whose maiden name was G. F. of the first part; L. L. of &c. widow, whose maiden name was L. F. of the second part; M. F. of &c. of the third part; and J. F of &c. of the fourth part.

Whereas by the death of H. F. late of &c. deceased, the late brother of the said G. B., L. L., and M. F., they the said G. B., L. L., and M. F. as his sisters and co-heirs,

⁸ See Note 1, Div. IV. to page 203, 6 Butl. Co. Litt.

became seised of, or entitled to, the freehold estates in the county of Y. hereinafter mentioned.

And whereas the said R. B. and G. his wife, L. L., and M. F., being desirous of making a partition of the said estates, to which they are respectively entitled as aforesaid, they did by articles of agreement, bearing date on or about the 25th day of &c. now last past, nominate, authorize, and appoint J. S. of &c., and J. B. of &c., to survey, measure, and value the said estates, and every part thereof, and to set out, *divide, and allot the [*224] same, in manner hereinafter mentioned ; and the said R. B. and G. his wife, L. L., and M. F., did by the same articles agree to pay all costs, charges and expenses, which should be occasioned by, or incurred in, making such partition, and the costs and charges of all deeds and assurances which should be requisite or necessary for effecting the same partition and the confirmation thereof, in equal shares and proportions ;

And whereas in pursuance, and by virtue of such authority as aforesaid, they the said J. S. and J. B., after having attentively reviewed and surveyed the said estates late of the said H. F., deceased, with the appurtenances, and the timber and wood growing thereon respectively, and after duly examining and considering the said estates and the condition thereof, and the buildings belonging thereto, and the state of the repairs thereof, and the situation, quantity, nature, quality, and condition of the same estates, and the several rent-charges, and outgoings, chargeable upon and issuing out of the same, did fairly and impartially make a partition of all the said estates into three equal parts, shares, and allotments ; and the said J. S. and J. B. have caused a schedule or particular to be made of each part, share, or allotment, containing a description, rental and valuation, of the lands and hereditaments comprised in such schedule or particular : and which schedules being marked 1, 2, and 3, *were enclosed in three several cases, or wrap-[*225]pers, made up in the same form, and sealed by the said J. S. and J. B. ;

And whereas at a meeting between the said R. B. and G. his wife, and L. L., and M. F., held on the 9th day

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of October instant, before the date of these presents, at the dwelling-house of the said R. B., the said three schedules, or particulars, so numbered, enclosed, and sealed as aforesaid, were put into a basket by the said J. S. and J. B., and one of the said schedules was then and there drawn out of the said basket by the said R. B. and G. his wife, as and for their lot or share of and in the said hereditaments, which schedule on being opened by the said J. S. and J. B. proved to be No. 1; and one other of the said schedules was drawn out of the said basket by the said L. L., as and for her lot or share of and in the said hereditaments, which on being opened, as aforesaid, proved to be No. 3; and the remaining schedule was drawn out of the said basket by the said M. F. as and for her lot or share of and in the said hereditaments, and which on being opened, as aforesaid, proved to be No. 2;

And whereas the said R. B. and G. his wife, L. L., and M. F., being severally convinced of the impartiality of the said J. S. and J. B. in making the said partition and allotment of the said estates in manner aforesaid, and being satisfied with the several lots, or shares, by them [*226] *respectively drawn at the said meeting, have mutually agreed, and are willing and desirous, to corroborate and confirm the said allotments and partition in such manner as hereinafter is expressed.

Now therefore this indenture witnesseth, that in pursuance of the said agreement, and in consideration of the premises, and for corroborating and confirming the partition and division so made of the said estates by the said J. S. and J. B. as aforesaid: and to the end and intent, that the said several lots and shares of and in the same, respectively drawn by the said R. B. and G. his wife, L. L., and M. F., may be held and enjoyed in severalty; and also in consideration of the sum of 10*s.* to the said R. B. and G. his wife, L. L., and M. F. paid by the said J. F. at or before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged,) the said R. B. and G. his wife, L. L., and M. F. have, and every of them hath, granted, bargained, sold, aliened, released, and confirmed, and by these presents (intended to be duly acknowledged by the said G. B. pursuant to the act

for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance) do, and every of them doth grant, bargain, sell, alien, release, and confirm unto the said J. F. and his heirs,

All that capital messuage, or tenement, &c. &c.; and also all and singular other messuages, *cottages, [**227] lands, tenements, and hereditaments whatsoever in the parish of in the said county of G. or elsewhere in the kingdom of Great Britain, of or to which the said H. F. was at the time of his decease seised or entitled at law or in equity for any estate of inheritance in possession, reversion, remainder, or expectancy; and all and singular houses, outhouses, &c. &c.; and the reversion and remainder, reversions and remainders, yearly and other rents, issues, and profits of the premises; and all the estate, right, title, interest, property, claim, and demand whatsoever, of them the said R. B. and G. his wife, L. L., and M. F., and every of them, in, to, and out of the same messuages and hereditaments, and every of them;

To have and to hold the said messuages, lands, and other hereditaments expressed to be hereby granted and released, with the appurtenances, unto the said J. F., and his heirs for ever, to the several uses hereinafter limited and expressed concerning the same; (that is to say,) in consideration of £ 1000

As to, for, and concerning all such and so many, and such part and parts of the said messuages and other hereditaments expressed to be hereby granted and released, as are comprised in the schedule hereinbefore mentioned to be marked No. 1, and to be drawn by, and as for the lot or share of, the said R. B. and G. his wife, a true copy of which schedule No. 1 is hereunto annexed, or [**228] hereunder written, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, To the use of the said R. B., and his assigns, during the term of his natural life; and from and immediately after his decease, to the use of the said G. B., her heirs and assigns for ever; and to be by him, her, and them held in severalty, in lieu of the undivided part or share of the said R. B. and G. his wife, in right

of the said G., of and in the entirety of the said messuages and other hereditaments hereinbefore expressed to be hereby granted and released;

And as, to, for, and concerning all such and so many, and such part and parts of the said messuages and other hereditaments hereinbefore expressed to be hereby granted and released, as are comprised in the said schedule hereinbefore mentioned to be marked No. 3, and to be drawn by the said L. L., and as and for the lot or share of her the said L. L., a true copy of which said schedule No. 3, is also hereunto annexed, or hereunder written, and every part and parcel thereof, with their, and every of their, rights, members, and appurtenances, To the use of the said L. L., her heirs and assigns for ever, to be by her and them held in severalty, in lieu of the undivided part or share of the said L. L. of and in the entirety of the said messuages and other hereditaments hereinbefore expressed to be hereby granted and released;

*[229] And as, to, for, and concerning all such and so many, and such part and parts of the said messuages and other hereditaments hereinbefore expressed to be hereby granted and released as are comprised in the said schedule hereinbefore mentioned to be marked No. 2, and to be drawn by, and as and for the lot or share of, the said M. F., a true copy of which said last-mentioned schedule No. 2, is also hereunto annexed, or hereunder written, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, To the use of the said M. F. her heirs, and assigns for ever, to be by her and them held in severalty, in lieu of her undivided part or share of and in the entirety of the said messuages and other hereditaments hereinbefore expressed to be hereby granted and released.

And the said R. B. doth hereby for himself, his heirs, executors, and administrators, and so far only as concerns the acts, deeds, and defaults of himself and the said G. his wife, and each of them, and the quiet enjoyment and further assurance of one undivided third part of the said messuages and other hereditaments; and each of them, the said L. L. and M. F. doth hereby for her-

self, her heirs, executors, and administrators, and so far only as concerns her own acts, deeds, and defaults, and the quiet enjoyment and further assurance of another undivided third part of the same messuages and other hereditaments, covenant and agree with the said J. F. his heirs and *cestuis que use, and separately with [*230] every of such cestuis que use, in manner following, (that is to say,) that the said messuages and other hereditaments hereinbefore expressed to be hereby granted and released, with the appurtenances, shall from time to time, and at all times hereafter, remain, continue, and be to the uses hereinbefore limited and expressed, concerning the same, and shall and may be peaceably and quietly had, held, and enjoyed, and the rents and profits thereof received and taken accordingly, without the lawful let, suit, trouble, denial, eviction, or interruption, of, from, or by the said R. B. and G. his wife, L. L., and M. F., or any of them, or from, or by any person or persons claiming or to claim, by, from, through, or under them, or any of them; and that free and clear, and freely and clearly acquitted, exonerated, and discharged, or otherwise by the said R. B. and G. his wife, L. L., and M. F., or some of them, their, or some of their heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified, of, from, and against all and singular former and other gifts, grants, bargains, sales, leases, mortgages, estates, titles, troubles, charges, and incumbrances whatsoever had, made, done, committed, or suffered, or to be had, made, done, committed, or suffered by the said R. B. and G. his wife, L. L., and M. F., or any of them; and moreover that the said R. B. and G. his wife, L. L., and M. F. respectively, and their respective heirs, and every other person having, or lawfully, or equitably *claiming, or who shall or [*231] may have, or lawfully, or equitably claim, any estate, right, title, or interest in, to, or out of, the said messuages and other hereditaments hereinbefore expressed to be hereby granted and released, or any of them, or any part thereof, by, from, through, or under them, or any of them, shall and will from time to time, and at all times hereafter, upon every reasonable request, and at

the proper costs and charges of the said J. F., his heirs, or cestuis que use, or any of them, make, do, acknowledge, and execute, or cause or procure to be made, done, acknowledged, and executed, all such further and other lawful and reasonable acts, deeds, conveyances, and assurances in the law whatsoever, for the further, better, and more perfectly and absolutely granting, conveying, and assuring the same messuages and other hereditaments, with the appurtenances, to the uses hereinbefore limited concerning the same; as by the said J. F., his heirs or cestuis que use, or any of them, or their or any of their, counsel in the law shall be reasonably advised, or devised, and required.

And whereas upon the treaty for the aforesaid partition it was agreed, that the several title-deeds, evidences, and writings relating to the said messuages and other hereditaments hereinbefore expressed to be hereby granted and released should be deposited with the said L. L., upon the said L. L. entering into a covenant to produce the same, and to permit copies to be made [*232] thereof, *when thereunto required, in manner hereinafter mentioned; and in pursuance of such agreement, the title-deeds, evidences, and writings, mentioned in the schedule hereunder written, have been delivered to the said L. L., which she doth hereby acknowledge.

Now this Indenture further witnesseth, that in pursuance of the said last-mentioned agreement, and in consideration of the premises, the said L. L. for herself, her heirs, executors, administrators, and assigns, doth hereby covenant, promise, and agree to and with the said J. F. his heirs, and cestuis que use, and, as a separate covenant, to and with each of them the said R. B. and G. his wife, and F. M., his and her heirs and assigns, that she the said L. L., her heirs, executors, administrators, or assigns, shall and will from time to time, and at all or any time or times hereafter (unless prevented by fire or other inevitable accident), upon every reasonable request, and at the proper costs and charges of the said J. F., his heirs, or cestuis que use, or of any of such cestuis que use, produce, and show forth, or cause or procure to

be produced and shown forth, to him, her, or them, or any of them, or to such person or persons as he, she, or they, or any of them, shall direct, desire, or require, or at any trial, hearing, or examination, in any court of law or equity, or other judicature, or upon the execution of any commission in England, as occasion shall be or require, the several deeds, evidences, and writings *mentioned in the schedule thereof hereunder [*233] written, and every or any of them; and at the like request, costs, and charges, make and deliver, or cause to be made and delivered unto the said J. F., his heirs, or cestuis que use, or any of such cestuis que use, attested, or other copies or abstracts of, or extracts from, all, or any of, the same deeds, evidences, or writings, and permit such copies, abstracts, or extracts to be examined and compared with the originals by any person or persons whom he or they may appoint, for the manifestation, defence, and support of the estate, right, title, interest, property, or possession of the said J. F., his heirs and cestuis que use, or any of them, of, in, or to all or any of the said messuages and other hereditaments hereinbefore expressed to be hereby granted and released, with the appurtenances. In witness, &c.

[*The Schedule to which the above written Indenture refers.*]

***A P P O I N T M E N T**

[*234]

TO A PURCHASER IN FEE.

THIS Indenture, made the day of
in the year of our Lord one thousand eight hundred and
forty-three: (in pursuance, &c.) Between Michael Munn
of of the first part, Nathan Nore of
of the second part, and Peter Penny of of the
third part: WHEREAS by indentures of lease and release,
bearing date respectively on or about the and
days of January, in the year of our Lord one

thousand eight hundred and thirteen, the release being made, or expressed to be made, between Charles Church of [redacted] of the first part, the said Michael Munn of the second part, and the said Nathan Nore of the third part; the messuages or tenements, piece or parcel of ground and hereditaments hereinafter described, and intended to be hereby appointed and released, were conveyed and assured, and now stand limited, To the use of such person or persons, for such estate or estates, interest or interests, and to and for such intents and purposes, and in such *manner and form, as he the said Michael Munn by any deed or deeds, instrument or instruments in writing, to be sealed and delivered by him in the presence of, and attested by, two or more credible witnesses, shall direct, limit, or appoint ; and in default of, and until such direction, limitation, or appointment, To the use of the said Michael Munn and Nathan Nore, and the heirs and assigns of the said Nathan Nore for ever; In Trust, nevertheless, as to the estate and interest thereby limited in use to the said Nathan Nore, his heirs and assigns, for, and for the only benefit of, the said Michael Munn, his heirs and assigns for ever; and to be conveyed and disposed of from time to time, as he the said Michael Munn, his heirs or assigns, should direct or appoint : AND WHEREAS the said Peter Penny hath contracted and agreed with the said Michael Munn for the absolute purchase of the messuages or tenements, piece or parcel of ground and hereditaments hereinafter described, and intended to be hereby appointed and released, and the inheritance thereof in fee-simple, free from all incumbrances, at or for the price or sum of three hundred pounds: Now THIS INDENTURE WITNESSETH, that in pursuance of the said recited contract, and in consideration of the sum of three hundred pounds of lawful money of Great Britain to the said Michael Munn, in hand, paid by the said Peter Penny, at or before the sealing and delivery of these presents, the receipt whereof he the said Michael Munn doth hereby acknowledge, and of *and from the same and every part thereof [redacted] doth acquit, release, and discharge the said Peter Penny, his heirs, executors, administrators, and assigns,

and every of them, for ever by these presents ; he the said Michael Munn, in pursuance of the power or authority given or reserved to him in and by the said recited indenture of release, and by force and virtue thereof and of every other power and authority to him given or reserved, in him vested, or in any wise enabling him in this behalf, Hath directed, limited and appointed, and by this deed or instrument in writing, sealed and delivered by him in the presence of, and attested by, two credible witnesses, Doth direct, limit, and appoint, that the messuages or tenements, piece or parcel of ground and hereditaments, hereinafter described, and intended to be hereby granted and released, with the appurtenances, shall henceforth remain, continue, and be,⁹ [to the use of the said Peter Penny, his heirs and assigns for ever.] AND THIS INDENTURE FURTHER WITNESSETH, that in further pursuance of the said recited contract, and for the consideration aforesaid, and also in consideration of the sum of five shillings of lawful money of Great Britain, to the said Michael Munn and Nathaniel Nore in hand paid by the said Peter Penny, at or before the sealing and delivery of these presents, *the receipt [*237] whereof is hereby acknowledged, He the said Nathan Nore, at the request, and by the direction of the said Michael Munn (testified by his being a party to, and sealing and delivering these presents,) Hath bargained, sold, aliened, and released, and by these presents Doth bargain, sell, alien, and release, and the said Peter Penny Hath granted, bargained, sold, aliened, released, and confirmed, and by these presents Doth grant, bargain, sell, alien, release, and confirm unto the said Peter Penny, and his heirs and assigns, All those messuages, &c.; and also all that piece or parcel of ground, &c.; together with all houses, out-houses, buildings, barns, stables, yards, gardens, orchards, trees, woods, underwoods, hedges, ditches, mounds, fences, ways, waters, watercourses, lights, easements, privileges, commodities, advantages, emoluments, rights, members, and appurte-

* [Where the limitations in the subsequent operative part of the deed are to uses in bar of dower, substitute for the part in brackets, the following : " to the uses hereinafter limited and declared of and concerning the same."]

nances whatsoever, to the said messuages or tenements, piece or parcel of ground, and hereditaments belonging, or in any wise appertaining, or at any time heretofore used or enjoyed therewith, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof, or of any part thereof; and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of all and singular the premises; and also all the estate, right, title, interest, use, trust, property, possession, claim, and demand whatsoever, both at law and in equity, of them the said Michael Munn and [**238] Nathan Nore, and of each of them, in, to, and out *of the said messuages or tenements, piece or parcel of ground, and hereditaments, hereby granted and released, or intended so to be, and every or any part thereof; together with all deeds, evidences, and writings relating to, or concerning the premises hereby granted and released, or intended so to be, or any of them, or any part thereof, now in the custody or power of them the said Michael Munn and Nathan Nore, or of either of them, or which they or either of them can obtain or procure without suit at law or in equity: To Have and To Hold the said messuages or tenements, piece or parcel of ground, and hereditaments hereby granted and released, or expressed or intended so to be, and every part thereof, with the appurtenances, unto the said Peter Penny, his heirs and assigns for ever, to the only proper use and behoof of the said Peter Penny, his heirs and assigns for ever. And the said Peter Penny doth hereby declare, that no widow whom he may happen to leave, shall be entitled to dower out of the said hereditaments, or any part thereof. And the said Nathan Nore, for himself, his heirs, executors, and administrators, doth hereby covenant and declare with and to the said Peter Penny, his heirs and assigns, that he the said Nathan Nore hath not at any time heretofore made, done, executed, committed, or knowingly suffered, or been privy to any act, deed, matter, or thing whatsoever, whereby, or by reason or means whereof, the messuages or tenements, piece or parcel of ground, and hereditaments hereby appointed and

released, *or expressed or intended so to be, or any [**239] part thereof, are, is, can, shall, or may be conveyed, assured, impeached, charged, or in any wise incumbered. And the said Michael Munn, for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree to and with the said Peter Penny, his heirs and assigns, in manner following, (that is to say,) That (for and notwithstanding any act, deed, matter, or thing whatsoever made, done, executed, committed, occasioned, or suffered by him the said Michael Munn, or the said Nathan Nore, to the contrary) they the said Michael Munn and Nathan Nore are, or one of them is, at the time of the sealing and delivery of these presents, lawfully, and rightfully seized of, or well and sufficiently entitled to the messuages or tenements, piece or parcel of ground, and hereditaments hereby appointed and released, or expressed or intended so to be, with the appurtenances, for an absolute and indefeasible estate of inheritance in fee-simple in possession; and that (for and notwithstanding any such act, deed, matter, or thing as aforesaid) they the said Michael Munn and Nathan Nore, or one of them, now, at the time of the sealing and delivery of these presents, have or hath, in themselves or himself, good right, full power, and lawful and absolute authority, to appoint and release the messuages or tenements, piece or parcel of ground, and hereditaments hereby appointed and released, or expressed or intended so to be, and every part thereof, with the appurtenances, unto the said *Peter Penny, his heirs [**240] and assigns, in manner aforesaid, and according to the true intent and meaning of these presents; and also, that it shall and may be lawful for the said Peter Penny, his heirs and assigns, from time to time, and at all times hereafter, peaceably and quietly to enter into and upon, and to have, hold, use, occupy, possess, and enjoy the said messuages or tenements, piece or parcel of ground, and hereditaments hereby appointed and released, or expressed or intended so to be, and to receive and take the rents, issues, and profits thereof, and of every part thereof, to and for his and their own use and benefit, without any let, suit, trouble, denial, eviction,

ejection, interruption, or disturbance of, from, or by the said Michael Munn, or his heirs, or any other person or persons lawfully or equitably claiming, or to claim, by from, through, under, or in trust for him, them, or any of them; and that free and clear, and freely and clearly acquitted, exonerated, and discharged, or otherwise by the said Michael Munn, his heirs, executors, and administrators, well and sufficiently saved, defended, kept harmless, and indemnified, of, from, and against all estates, titles, troubles, charges, and incumbrances whatsoever, at any time or times heretofore, or to be at any time or times hereafter had, made, done, executed, committed, occasioned, or suffered by the said Michael Munn, or by any other person or persons lawfully or equitably claiming or to claim, by, from, through, under, or in trust for him: And moreover, that he the said [*241] *Michael Munn, and his heirs, and every other person having, or lawfully or equitably claiming, or who shall or may have, or lawfully or equitably claim, any estate, right, title, or interest, in, to, or out of the said messuages or tenements, piece or parcel of ground, and hereditaments, hereby appointed and released, or expressed or intended so to be, or any part thereof, by, from, through, under, or in trust for him or them, shall and will from time to time, and at all or any time or times hereafter, upon every reasonable request, and at the proper costs and charges in the law of the said Peter Penny, his heirs or assigns, make, do, acknowledge, and execute, or cause and procure to be made, done, acknowledged, and executed, all such further and other lawful and reasonable acts, deeds, and things, conveyances, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely granting, releasing, conveying, and assuring the said messuages or tenements, piece or parcel of ground, and hereditaments hereby appointed and released, or expressed or intended so to be, and every part thereof, with the appurtenances, unto and to the use of the said Peter Penny, his heirs and assigns for ever, or otherwise as he or they shall direct or appoint, as by the said Peter Penny, his heirs or assigns, or any of them, or his or their or any of their counsel in

the law, shall be reasonably devised or advised, and required; so that the person or persons, who shall be required to make and execute any such further assurance or *assurances, be not compelled, nor compellable, [*242] for the making or doing thereof, to go or travel from his, her, or their dwelling or respective dwellings, or usual place or places of residence or abode. In witness, &c.

*** A P P O I N T M E N T.**

[*243]

SETTLEMENT BEFORE MARRIAGE UNDER A POWER OF APPOINTMENT.

THIS Indenture, made, &c., [in pursuance, so far as the same is intended to operate as a release, of an act of parliament passed in the fourth year of the reign of her present Majesty, intituled, "An Act for rendering a Release as effectual for the conveyance of Freehold Estates, as a Lease and Release by the same Parties,"] Between Francis Frederick, of, &c., of the first part; William Frederick, of, &c., (the eldest son of the said Francis Frederick,) of the second part; Grace Griffith, of, &c., spinster, of the third part; Henry Howard, of, &c., and Henry Hunt, of, &c., of the fourth part; John Jones, &c., and James Impey, of, &c., of the fifth part; and Launcelot Lyon, of, &c., and Luke Lucas, of, &c., of the sixth part.

WHEREAS, by indenture of release, bearing date the day of and expressed to be made [in pursuance of the hereinbefore mentioned act of parliament,] between the said Francis Frederick, of the first part, the said *William Frederick, of the second [*244] part, James Allen, of, &c., of the third part, and William Andrews, of, &c., of the fourth part; all that the manor of in the county of with the rights, members, and appurtenances, and all that capital messuage, or mansion-house, &c. &c., were, and now stand, settled, limited, and assured, To the use of such

person or persons, for such estate or estates, interest or interests, ends, intents, and purposes, and with, under, and subject to such powers, provisoies, limitations, declarations, and agreements, and in such sort, manner, and form, as the said Francis Frederick and William Frederick from time to time, or at any time or times, by any deed or deeds, instrument or instruments in writing, with or without power or revocation and new appointment, to be by them sealed and delivered in the presence of, and attested by, two or more credible witnesses, shall jointly direct, limit, or appoint; and in default of such joint direction, limitation, or appointment, to such uses as in the same indenture of release are mentioned of and concerning the same premises.

And whereas a marriage hath been agreed upon, and is intended to be shortly had and solemnized between the said William Frederick and Grace Griffith; and upon the treaty for, and in consideration of, the said intended marriage, the said Francis Frederick and William Frederick did propose and agree, that the said manor, messuages, lands, advowson, tenements, and hereditaments [*245] *hereinbefore mentioned, with the appurtenances, should be conveyed, limited, and assured to, for, and upon the uses, trusts, intents, and purposes, and under and subject to the powers, provisoies, declarations, and agreements hereinafter limited, declared, and contained of and concerning the same.

NOW THIS INDENTURE WITNESSETH, That in pursuance of the said recited proposal and agreement, and in consideration of the said intended marriage, they the said Francis Frederick and William Frederick, in pursuance of the power or authority to them given, limited, or reserved in and by the said indenture of release as aforesaid, and by force and virtue thereof, and of every other power and authority to them given and reserved, in them vested, or them in any wise enabling in this behalf, Do by this deed or instrument in writing, by them sealed and delivered in the presence of, and attested by, two credible witnesses, direct, limit, and appoint, that the said manor, messuages, lands, tenements, advowson, hereditaments, and premises comprised in the said inden-

ture of release, and hereinbefore described, with their, and every of their rights, members, and appurtenances, shall henceforth remain, continue, and be, To, for, and upon the uses, trusts, intents, and purposes, and under and subject to the powers, provisoies, declarations, and agreements hereinafter expressed, declared and contained of and concerning the same.

*And this indenture further witnesseth, That [*246] in further pursuance of the said recited agreement, and in consideration of the said intended marriage, and of the sum of five shillings of lawful money of Great Britain by the said Henry Howard and Henry Hunt in hand paid to the said Francis Frederick and William Frederick, at or before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged;) They the said Francis Frederick and William Frederick have, and each of them hath granted, bargained, sold, released, and confirmed, and by these presents do, and each of them doth grant, bargain, sell, release, and confirm unto the said Henry Howard and Henry Hunt, and their heirs, All and every the said manor, messuages, lands, tenements, advowson, hereditaments, and premises comprised in the said recited indenture of release, and hereinbefore described; with their and every of their rights, members and appurtenances; and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits thereof, and of every part and parcel thereof; and all the estate, right, title, interest, trust, property, claim, and demand whatsoever of them the said Francis Frederick and William Frederick, and of each of them, in, to, and out of the same premisses, and every of them, and every or any part or parcel thereof;

To Have and To Hold the said manor and other hereditaments hereby granted and released, or *expressed or intended so to be, with their and every [*247] of their rights, members, and appurtenances, unto the said Henry Howard and Henry Hunt, and their heirs for ever; nevertheless, to, for, and upon the uses, trusts, intents, and purposes, and under and subject to the powers, provisoies, declarations, and agreements hereinafter

limited, expressed, declared, and contained of and concerning the same; (that is to say,)

Until the said intended marriage shall take effect and be solemnized, To such and the same uses, upon and for such and the same trusts, intents, and purposes, and under and subject to such and the same powers, provisoës, declarations, and limitations, as the said manor, and other hereditaments, at the time of, or immediately before the execution of these presents, were or stood limited, settled, and assured; and from and after the solemnization of the said intended marriage,

To the use, intent, and purpose, that the said William Frederick and his assigns shall and may, during the joint lives of himself and the said Francis Frederick, by and out of the said manor and other hereditaments, have, receive, and take the yearly rent or annual sum of £ [redacted] of lawful money of Great Britain, free from taxes, [except the tax on property or income], and without any other deduction whatsoever, the said yearly rent [*248] or annual sum of £ [redacted] to be paid *and payable to him the said William Frederick and his assigns, during the joint lives of himself and the said Francis Frederick, at or in the common dining-hall of Lincoln's Inn, in the said county of Middlesex, by quarterly payments, on the days hereafter mentioned; (that is to say,) the twenty-fifth day of December, the twenty-fifth day of March, the twenty-fourth day of June, and the twenty-ninth day of September, in every year, by even and equal portions; the first payment thereof to begin and be made on such of the same days of payment as shall first happen after the solemnization of the said intended marriage:

And to this further use, intent, and purpose, that the said Grace Griffith (in case she shall survive the said William Frederick her intended husband,) and her assigns, shall and may, from and after the decease of the said William Frederick, yearly and every year, during the then remainder of her natural life, have, receive, and take, by and out of the said manor and other hereditaments, the yearly rent, or annual sum of £ [redacted] of lawful money of Great Britain, free from

taxes, [except the tax on property, or income], and without any other deduction whatsoever, and such yearly rent, or annual sum of £ to be in full for the jointure of the said Grace Griffith, and in lieu, bar, and satisfaction of and for her whole dower or thirds, at common law, or by or on account of custom or free bench, *which she can or may, or otherwise might [*249] or could have or claim in or out of all and every, or any of the freehold, copyhold, or customary manors, messuages, lands, tenements, and hereditaments, whereof or whereunto the said William Frederick now is, or at any time or times during the said intended coverture shall be seised or entitled, for any estate of freehold, or copyhold of inheritance, or to which dower or free bench is incident; and to be paid to the said Grace Griffith, or her assigns, at or in the common dining-hall of Lincoln's Inn, in the county of Middlesex, by quarterly payments, on the days hereinbefore mentioned; the first quarterly payment thereof to begin and be made on such of the said days as shall first happen after the decease of the said William Frederick:

And to and for this further use, intent, and purpose, that in case any quarterly payment or payments of either of the said yearly rents, or annual sums of £ and £ so payable for the time being as aforesaid, or any part thereof, shall at any time or times be in arrear or unpaid by the space of fourteen days next over or after any of the said days whereon the same ought to be paid as aforesaid; then, and so often as the same shall happen, it shall and may be lawful for the person or persons for the time being entitled to the yearly rent or annual sum, the quarterly payment whereof shall be so in arrear as aforesaid, into and upon the said manor *and other hereditaments, and into and upon [*250] every, or any part or parcel thereof, to enter, and distrain for the same yearly rent or annual sum; and the distress and distresses, then and there found, to take, lead, drive, carry away, and impound, and in pound to detain and keep until the yearly rent or annual sum so behind and unpaid, and all arrears thereof, together with all costs, charges, and expenses occasioned and incurred

by taking and keeping such distress or distresses, shall be fully paid and satisfied ; and in default of payment thereof, or of any part thereof, in due time after such distress or distresses shall be taken, to appraise, sell, and dispose of, or cause to be appraised, sold, and disposed of, such distress or distresses, or otherwise to act therein according to the due course of law, in like manner as in cases of distress taken for non-payment of rent reserved upon common leases ; to the intent, that thereby and therewith, or otherwise, the yearly rent or annual sum so behind and unpaid as aforesaid, and all arrears thereof, and all costs, charges, and expenses attending the non-payment and recovery of the same, shall and may be fully paid and satisfied :

And to and for this further use, intent, and purpose, that in case any quarterly payment or payments of the said yearly rents, or annual sums of £ and £ or either of them, or any part thereof, shall at any time or times be in arrear or unpaid, by the space of twenty-eight [*251] days next over or after any of the said days hereinbefore mentioned and appointed for payment thereof; then, and so often as the same shall happen (although no formal or legal demand thereof shall be made) it shall and may be lawful for the person or persons for the time being entitled to the yearly rent or annual sum, the quarterly payment whereof shall be so in arrear, into and upon all and singular the said manor and other hereditaments, or into and upon any part thereof, in the name of the whole, to enter, and the same to have, hold, occupy, possess, and enjoy, and the rents, issues, and profits thereof, and of every part thereof, to have, receive, and take to and for his, her, or their own use and benefit, until he, she, or they shall thereby and therewith, or by any other means, be fully paid and satisfied the yearly rent or annual sum so behind and unpaid, and all arrears thereof, and all such arrears of the same as shall grow due or incur during the time that he, she, or they shall, by virtue of such entry or entries, be in possession of the premises, or any part thereof, together with all costs, charges, and expenses whatsoever attending, or occasioned by, the non-payment or

recovery of the same, or any part thereof, or in relation thereto; such possession, when taken, to be without impeachment of waste.

And as for and concerning the said manor, messuages, lands, tenements, and hereditaments *hereby appointed and released, or expressed or intended so to be, from and immediately after the solemnization of the said intended marriage (subject to, and charged and chargeable with the said yearly rents or annual sums of £ and £ or such of them as, according to events, shall be payable for the time being as aforesaid, and to the remedies and powers hereinbefore given and provided for securing the same respectively.)

To the use of the said John Jones and James Impey, their executors, administrators, and assigns, for and during, and unto the full end and term of two hundred years thence next ensuing, and fully to be complete and ended, without impeachment of waste; upon and for the trusts, intents, and purposes, and under and subject to the powers, provisoies, declarations, and agreements herein-after expressed, declared, and contained of and concerning the same term; and from and immediately after the end, expiration, or sooner determination of the said term of two hundred years, and in the mean time subject thereto, and to the trusts thereof,

To the use of the said Francis Frederick and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste; and from and immediately after the determination of that estate by forfeiture, or otherwise, in his lifetime,

*To the use of the said Henry Howard and Henry Hunt and their heirs, during the life of the said Francis Frederick, in trust to support and preserve the contingent uses and estates hereafter limited from being defeated or destroyed: and for that purpose to make entries and bring actions, as occasion may require; but nevertheless to permit and suffer the said Francis Frederick, and his assigns, during his life, to receive and take the rents, issues, and profits of the premises, to and for his and their own use and benefit; and from and immediately after his decease,

To the use of the said William Frederick and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste; and from and immediately after the determination of that estate by forfeiture, or otherwise, in his lifetime,

To the use of the said Henry Howard and Henry Hunt and their heirs, during the life of the said William Frederick, in trust to preserve and support the contingent uses and estates hereinafter limited from being defeated or destroyed; and for that purpose to make entries and bring actions, as occasion may require: but nevertheless to permit and suffer the said William Frederick and his assigns, during his life, to receive and take the rents, issues, and profits of the premises to and for his and their own use and benefit; and *from and immediately [*254] after the decease of the survivor of them the said Francis Frederick and William Frederick,

To the use of the said Launcelot Lyon and Luke Lucas, their executors, administrators, and assigns, for and during, and unto the full end and term of five hundred years thence next ensuing, and fully to be complete and ended, without impeachment of or for any manner of waste; nevertheless upon and for the several trusts, intents, and purposes, and under and subject to the several powers, provisoies, declarations, and agreements hereinafter expressed, declared, and contained of and concerning the same term; and from and after the end, expiration, or sooner determination of the said term of five hundred years, and in the mean time subject thereto, and to the trust thereof,

To the use of the first son of the body of the said William Frederick on the body of the said Grace Griffith, his intended wife, lawfully to be begotten, and the heirs male of the body of such first son lawfully issuing; and for default of such issue,

To the use of the second, third, fourth, fifth, sixth, and all and every other the son and sons of the body of the said William Frederick on the body of the said Grace Griffith, his intended wife, lawfully to be begotten, severally, successively, *and in remainder, one after [*255] another, as they and every of them, shall be in

seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing; the elder of such sons, and the heirs male of his body issuing, being always to be preferred, and to take before, the younger of such sons, and the heirs male of his and their body and respective bodies issuing; and for default of such issue,

To the use of the first son of the body of the said William Frederick on the body of any other wife, lawfully to be begotten, and the heirs male of the body of such first son lawfully issuing; and for default of such issue,

To the use of the second, third, fourth, fifth, sixth, and all and every other the son and sons of the said William Frederick on the body of any such other wife or wives, lawfully to be begotten, severally, successively, and in remainder, one after another, as they, and every of them, shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing; the elder of such sons, and the heirs male of his body issuing, being always to be preferred, and to take before, the younger of such sons, and the heirs male of his and their body and respective bodies issuing; and for default of such issue,

*To the use of all and every the daughter and [256] daughters of the said William Frederick on the body of the said Grace Griffith, his intended wife, lawfully to be begotten, equally to be divided between or amongst them, if more than one, share and share alike, as tenants in common, and not as joint-tenants, and of the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing; and in case there shall be a failure of issue of any one or more of such daughters, then as well as to the original share or shares of, as the share or shares surviving or accruing to, such last-mentioned daughter or daughters, or her or their issue, to the use of all and every other the daughter and daughters of the said William Frederick on the body of the said Grace Griffith

lawfully to be begotten, to be divided between or among them, if more than one, share and share alike, as tenants in common, and not as joint-tenants, and of the several and respective heirs of their bodies issuing; and in case all such daughters, but one, shall happen to die without issue, or if there shall be but one such daughter, then to the use of such one or only daughter, and the heirs of her body lawfully issuing; and for default of such issue,

To the use of all and every the daughter and daughters of the said William Frederick on the body of any other wife or wives, lawfully to be begotten, equally to be divided between or amongst *them, share and share alike, as tenants in common, and not as joint-tenants, and of the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing; and in case there shall be a failure of issue of any one or more of such daughters, then as well as to the original share or shares of, as to the share or shares surviving or accruing to, such last-mentioned daughter or daughters, or her or their issue, to the use of all and every other the daughter and daughters of the said William Frederick, on the body of any such other wife or wives lawfully to be begotten, to be divided between or among them, if more than one, share and share alike, as tenants in common, and not as joint-tenants, and of the several and respective heirs of their bodies issuing; and in case all such daughters, but one, shall happen to die without issue, or if there shall be but one such daughter, then to the use of such one or only daughter, and of the heirs of her body lawfully issuing; and for default of such issue,

To the use of the said Francis Frederick, his heirs and assigns for ever.

And as to, for, and concerning the said term of two hundred years hereinbefore limited in use to the said John Jones and James Impey, their executors, administrators, and assigns as aforesaid, it is hereby agreed and declared between and by the said parties hereto, that the same is so limited to *them upon and for the trusts, intents, and purposes, and under and subject to the powers, provisoies, declarations, and agree-

ments hereinafter expressed, declared, and contained of and concerning the same; (that is to say,)

Upon trust, in case, and so often as, any quarterly payment or payments of the said yearly rents or annual sums of £ and £ so payable respectively for the time being as aforesaid, or either of them, or any part thereof respectively, shall be behind and unpaid by the space of forty days next over, or after, any of the said days hereinbefore appointed for payment of the same respectively (although no formal or legal demand thereof shall be made); then, and so often as the same shall happen, that they the said John Jones and James Impey, or the survivor of them, or the executors, administrators, or assigns of such survivor, shall and do from time to time, by and out of the rents, issues, and profits of the said manor and other hereditaments comprised in the said term of two hundred years, or by demising, leasing, selling, or mortgaging the same premises, or any of them, or any part thereof, for all, or any part of, the same term, or by bringing actions against the tenants or occupiers of the same premises, or any of them, for the rents then in arrear, or by such other ways or means as to them or him shall seem meet, raise and levy such sum and sums of money as shall be sufficient from time to time to pay and satisfy such arrears *of the said yearly rents [*259] or annual sums of £ and £ or either of them, or so much thereof as shall from time to time happen to be in arrear and unpaid; together with all loss, costs, charges, damages, and expenses, which the said John Jones and James Impey, or the survivor of them, or the executors, administrators, or assigns of such survivor, and the person or persons for the time being respectively entitled to such arrears as aforesaid, shall sustain, expend, or be put unto, for or by reason of the non-payment of the said yearly rents or annual sums of £ and £ or either of them, or any part thereof, at the days and times, and in manner before appointed for the payment thereof respectively; and shall and do pay, apply, and dispose of the same moneys accordingly.

And upon further trust, in case the said William Frederick shall die in the life-time of the said Francis

Frederick, and there shall be one or more child or children of the said William Frederick, on the body of the said Grace Griffith to be begotten, born in his lifetime, or in due time after his decease, then, and in such case, that the said John Jones and James Impey, or the survivor of them, or the executors, administrators, or assigns of such survivor, shall and do, during the then remainder of the life of the said Francis Frederick (subject and without prejudice to the raising and paying the said yearly rent or annual sum of £ and to the reme-
[*260] dies and powers for *recovering the same as aforesaid,) by and out of the annual rents and profits of the said manor and other hereditaments comprised in the said term of two hundred years, levy and raise for the maintenance, support, and education of such child or children, the yearly sum or sums of money hereinafter mentioned ; (that is to say,) in case there shall be but one such child, then the yearly sum of one hundred pounds ; and in case there shall be two such children, and no more, then the yearly sum of one hundred and fifty pounds, to be equally divided between them, share and share alike ; and in case there shall be three or more such children, then the yearly sum of two hundred pounds, to be equally divided among them, share and share alike ; and shall and do, at their or his discretion, either themselves pay and apply such sum or sums for the maintenance, support, and education of such child or children accordingly, or shall and do (if they the said trustees or trustee for the time being shall think proper) pay such sum or sums of money or any part or parts thereof to the guardian or guardians for the time being of such child or children, to be by such guardian or guardians applied for or towards the maintenance, support, and education of such child or children respectively ; and it is hereby agreed and declared, that such respective sums for maintenance as aforesaid shall be paid by quarterly payments on the days of payment hereinbefore mentioned, in every year, by equal portions ;
[*261] the first payment thereof to begin and *be made on such of the said days, as shall first happen

after the decease of the said William Frederick, dying in the lifetime of the said Francis Frederick as aforesaid.

Provided always, that in case any of the said children, who shall become entitled to the provision for maintenance as last hereinbefore mentioned, shall afterwards die in the lifetime of the said Francis Frederick, then the share of each such child so dying of and in such provision of maintenance as aforesaid, shall devolve upon, and vest in the survivors or survivor of them, in augmentation of, and in addition to, his, her, or their original share or shares thereof, as aforesaid; but so that the provision of maintenance for no one such child shall exceed the yearly sum of one hundred pounds, nor for two such children the yearly sum of one hundred and fifty pounds between them.

And upon further trust, that they the said John Jones and James Impey, and the survivor of them, and the executors, administrators, and assigns of such survivor, shall and do permit and suffer the person or persons, to whom the next or immediate reversion or remainder expectant upon the determination of the said term of two hundred years, of and in the premises therein comprised, shall, for the time being, belong, to receive and take the rents and profits, or the surplus of the rents and profits, which shall remain after, *and not be [*262] applied in or towards the execution and performance of the trusts hereby declared of the same term of two hundred years.

Provided also, and it is hereby agreed and declared between and by the said parties hereto, that when the trusts hereinbefore declared of and concerning the said term of two hundred years shall have been executed and performed or satisfied, or shall have become unnecessary or incapable of taking effect, and the costs and charges (if any) of the trustees of the same term, their executors, administrators, and assigns, in and about the execution and performance of the same trusts, shall have been fully paid and satisfied (and which they are hereby respectively authorized and empowered to levy and raise by all or any of the ways and means aforesaid, and to retain accordingly;) then, and immediately

thenceforth, the said term of two hundred years of and in the premises therein comprised, or so much thereof as shall remain unsold and undisposed of for the purposes aforesaid shall cease, determine, and be absolutely void.

And as, to, for, and concerning the said term of five hundred years, hereinbefore limited in use to the said Launcelot Lyon and Luke Lucas, their executors, administrators, and assigns as aforesaid, it is hereby agreed and declared between and by the said parties hereto, that the same is so limited to them upon and for the [*263] trusts, intents, and *purposes, and under and subject to the powers, provisoies, declarations and agreements, hereinafter expressed, declared, and contained of and concerning the same term; (that is to say,)

Upon trust, in case there should be any child or children of the said William Frederick on the body of the said Grace Griffith, his intended wife, or any other wife or wives, to be begotten, other than, or not being an eldest or only son, for the time being entitled, under the limitations hereinbefore contained, to the said manor and other hereditaments, for an estate tail in possession, or in remainder immediately expectant upon the decease of the survivor of the said William Frederick and Francis Frederick; then, that they the said Launcelot Lyon and Luke Lucas, or the survivor of them, or the executors, administrators, or assigns of such survivor, shall and do, either in the lifetime of the said William Frederick, with his consent in writing, or else not till after his decease (but subject and without prejudice to the life estate of the said Francis Frederick, and to the raising and paying the said yearly rent-charge or sum of £ hereinbefore limited in use to the said Grace Griffith for her life, and to such remedies for recovering the same as aforesaid), by demise, sale, or mortgage, of the said manor and other hereditaments comprised in the same term of five hundred years, or of a competent part thereof, for all or any part of the same term, or by and [*264] out of the annual rents, *issues, and profits thereof, or by bringing actions against the tenants or occupiers of the same premises, or any of them, for the rents then in arrear, or by all or any of the said ways

or means, or by such other ways or means as they the said Launcelot Lyon and Luke Lucas, or the survivor of them, or the executors, administrators, or assigns of such survivor, shall think fit, raise, and levy, or borrow and take up at interest, for the portion or portions of such child or children, whether by the said Grace Griffith or any other wife or wives, other than, or not being any of them an eldest or only son for the time being entitled as aforesaid, the sum or sums of money hereinafter mentioned; (that is to say,) if there shall be but one such child, not being an eldest or only son entitled as aforesaid, the sum of three thousand pounds of lawful money of Great Britain, as and for the portion of such one child, and to be paid and payable to, and to become vested in, such one child, at or upon such age, day, or time, as the said William Frederick, by any deed or writing, with or without power of revocation and new appointment, to be sealed and delivered by him in the presence of, and attested by, two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, shall direct or appoint; and in default of such direction or appointment, to be an interest vested in such child, being a younger son, at his age of twenty-one years, or, being a daughter, at her age of twenty-one years, or day of marriage *(which shall first happen); and to be paid to him or her at or upon such age or time accordingly, if the same shall happen after the decease of the said William Frederick; but if the same shall happen in his life-time, then the same shall be paid immediately after his decease, unless he shall signify his consent in writing, under his hand and seal, that the same shall be raised and paid in his life-time; and if there shall be two or more such children, other than, or not being any of them an eldest or only son entitled as aforesaid, then the sum of five thousand pounds of lawful money of Great Britain, for the portions of such two or more children; the said sum of five thousand pounds to be shared and divided between or among such children, not being an eldest or only son entitled as aforesaid, in such parts or proportions, and to vest in, and be paid to, such children respectively, at or

upon such ages, days, or times, and to be subject to such charges, provisoies, and limitations for the benefit of some or one of the said children, and in such manner, as the said William Frederick by any deed or deeds, instrument or instruments, in writing, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of, and attested by, two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, shall direct or appoint; and in default of such direction or appointment, to be equally divided between or among such children, other than, or not being any of them an eldest or [*266] only *son entitled as aforesaid, share and share alike; the share or respective shares of such of the said children as shall be a younger son or sons, to become a vested interest or vested interests in him or them respectively, at his or their age or respective ages of twenty-one years; and the share or shares of such of them as shall be a daughter or daughters, to become a vested interest or vested interests in her or them respectively, at her or their age or respective ages of twenty-one years, or day or respective days of her or their marriage or respective marriages (which shall first happen), and to be paid and payable at or upon the same ages, days, or times accordingly, in case the same shall happen after the decease of the said William Frederick; but in case the same shall respectively happen in the lifetime of the said William Frederick, then the same shall be paid immediately after his decease, unless he shall signify such consent as aforesaid, that the same or any of them shall be raised and paid in his lifetime.

Provided always, that no sale or mortgage, for raising such portion or portions as hereinbefore mentioned, of the said manor and other hereditaments, or any of them, or any part thereof, shall be made in the lifetime of the said Francis Frederick, unless with his consent and approbation, testified in writing under his hand and seal.

Provided always, and it is hereby agreed and declared [*267] between and by the said parties hereto, *that in case any appointment shall be made in pursuance of the powers aforesaid, or either of them, which shall

only extend to a part or parts of the sum or sums of money hereby intended for the portion or portions of such child or children, other than or not being an eldest or only son entitled as aforesaid, such appointment shall be valid and effectual, notwithstanding the non-appointment of the remaining part or parts of such portion or portions; but in that case, any child entitled to a portion or share under such appointment, shall be entitled to no further share of and in the remaining or unappointed part or parts of the moneys hereby intended for portions as aforesaid, until he or she shall have brought his or her appointed share into hotchpot, and shall have accounted for the same accordingly; unless the said William Frederick shall declare a contrary intention in writing.

And upon further trust, that they the said Launcelot Lyon and Luke Lucas, and the survivor of them, and the executors, administrators, and assigns of such survivor, shall and do in the mean time from and after the decease of the said William Frederick, and until the portion or portions hereby intended for daughters and younger sons as aforesaid, shall respectively become payable as aforesaid, (but subject and without prejudice as aforesaid,) by and out of the annual rents and profits of the said manor and other hereditaments comprised in the said term of five *hundred years, levy and [*268] raise, for the maintenance and education of such child or children, not being any of them an eldest or only son, such yearly sum and sums of money as herein-after mentioned; (that is to say,) until such child or children shall respectively attain the age of twelve years, such yearly sum for each of them as will be equivalent to the interest of the portion hereby intended for him or her as aforesaid, after the rate of two pounds for every one hundred pounds by the year; and from and after the age of twelve years, and until such portion or respective portions shall become payable, such yearly sum for each such child as will be equivalent to the interest of the portion hereby intended for him or her as aforesaid, after the rate of four pounds for every one hundred pounds by the year; and also shall and do, at

their or his discretion, either themselves pay and apply such sums for the maintenance and education of such child or children accordingly, or shall and do (if they the said trustees or trustee for the time being shall think proper) pay the said several sums of money or any part or parts thereof to the guardian or guardians for the time being of such child or children, to be by such guardian or guardians applied for or towards the maintenance and education of such child or children respectively; and it is hereby agreed and declared, that such respective sums for maintenance as aforesaid, shall be paid by quarterly payments on the days of payment [*269] hereinbefore mentioned, in *every year, by equal portions; the first payment thereof to begin and be made on such of the said days as shall first happen after the decease of the said William Frederick.

Provided always, and it is hereby agreed and declared between and by the said parties hereto, that if there shall be more than one such child, for whom portions are hereby provided as aforesaid, and any of them being a younger son or sons, shall depart this life, or become an eldest or only son, under the age of twenty-one years, or, being a daughter or daughters, shall depart this life under that age, without being or having been married; then, and in such case, and in default of, and subject to any such appointment as aforesaid, the portion hereby intended to be provided for each such daughter, and for each such son so dying, or becoming an eldest or only son, or so much, and such part thereof, as shall not be sooner advanced for any younger son or sons as hereinafter mentioned, shall accrue and belong to the survivor or survivors, and other or others of such children (not being an eldest or only son, entitled as aforesaid,) and shall vest in and be paid to him, her, or them (if more than one,) in equal parts and shares, at or upon such and the same ages, days, and times respectively, and in such and the same manner, as is hereinbefore declared, touching or concerning his, her, or their original portion or portions, or as near thereto as circumstances will permit; and such [*270] benefit of *survivorship and accrue shall extend as well to the surviving or accruing, as to the ori-

ginal portion or portions; but so nevertheless, that no one child shall by survivorship or otherwise have or be entitled to more than the sum of £ for his or her portion.

Provided always, and it is hereby agreed and declared between and by the said parties hereto, that it shall and may be lawful for the said Launcelot Lyon and Luke Lucas, or the survivor of them, or the executors, administrators, or assigns of such survivor, at any time or times during the life of the said William Frederick, with his consent and approbation signified by some deed or deeds, writing or writings, to be sealed and delivered by him in the presence of, and to be attested by, two or more credible witnesses, and at any time or times after his decease, at the discretion and of the proper authority of the said Launcelot Lyon and Luke Lucas, or the survivor of them, or the executors, administrators, or assigns of such survivor, to raise and levy, by all or any of the aforesaid ways or means (but subject nevertheless, and without prejudice as aforesaid,) any sum or sums of money, in part of the portion or portions hereby intended for such of the said children as shall be a younger son or sons, and shall and do, with the consent in writing of the said William Frederick during his life, and after his decease at their or his discretion, pay and apply the moneys so to be raised for *the purpose of placing or putting such younger son or sons, for whom, or in part of whose then presumptive portion or portions such sum or sums of money shall be raised, in or to any business, profession, or employment, or otherwise for his or their benefit or advancement in the world, notwithstanding his or their portion or portions shall not then have become payable as aforesaid; so nevertheless, that such sum or sums of money, so to be raised as last mentioned, shall not exceed one-half part of the presumptive portion or portions of such son or sons respectively; and so nevertheless, that such sum or sums shall be considered and taken as a part of the portion or portions hereby provided for such son or sons, for whose benefit such sum or sums shall be raised as aforesaid.

And upon this further trust, that they the said Launce-

lot Lyon and Luke Lucas, and the survivor of them, and the executors, administrators, and assigns of such survivor, shall and do permit and suffer the person or persons, to whom the next or immediate reversion or remainder expectant upon the determination of the said term of five hundred years of and in the premises therein comprised, shall for the time being belong, to receive the rents and profits, or the surplus of the rents and profits, which shall remain after, and not be applied in, or towards, the execution and performance of the trusts hereby declared of the said term of five hundred years.

*Provided always, and it is hereby further [^{*272}] agreed and declared between and by the said parties hereto, that in case the said William Frederick shall in his lifetime give or advance any sum or sums of money for or towards the preferment or advancement of any of the said children, being a younger son or sons, in the way of, or for the placing him or them in any profession, business, or employment, or, being a daughter or daughters, in marriage: then, and in such case, if any such sum or sums of money so to be advanced shall be equal to, or exceed, the portion or portions hereinbefore intended to be provided for such child or children respectively, such advanced sum or sums shall be accounted in full for the portion or portions so as aforesaid intended to be provided for such child or children respectively; but if such advanced sum or sums shall be less than the portion or portions hereinbefore intended to be provided for such child or children respectively, then such advanced sum or sums shall be accounted as part of the portion or portions so as aforesaid provided or intended for such child or children respectively; unless he, the said William Frederick, shall declare the contrary thereof respectively by any writing under his hand.¹

¹ If a father advances a child under this clause, the effect of such advancement is not clear; whether the sum advanced is to be kept on foot as part of the personal estate of the father; whether the other children are to be entitled to the whole sum directed to be raised in exclusion of the child advanced (*Folkes v. Western*, 9 Ves. 456); or whether so much of the original sum directed to be raised as will be equal to the sum advanced, will be extinguished for the benefit of the persons in remainder (*Pitfields's case*, 2 P. W. 513)? It is, therefore, proper to add the following clause: "and in case any child or children shall be so advanced, as aforesaid, by the said

he the said

Provided also, and it is hereby further *agreed [*273] and declared between and by the said parties hereto, that when the trusts hereinbefore declared of and concerning the said term of five hundred years, shall have been executed and performed, or satisfied, or shall have become unnecessary, or incapable of taking effect, and the costs and charges (if any) of the trustees of the same term, their executors, administrators, and assigns, in and about the execution and performance of the same trusts, shall have been fully paid and satisfied (and which they are hereby respectively authorised and empowered to levy and raise by all or any of the ways and means aforesaid, and to retain accordingly;) then, and immediately thenceforth, the said term of five hundred years of and in the premises therein comprised, or so much thereof as shall remain unsold and undisposed of for the purposes aforesaid, shall cease, determine and be absolutely void.

Provided also, and it is hereby further agreed and declared between and by the said parties *hereto, [*274] that if the said Grace Griffith shall die in the life-time of the said William Frederick, then, and in such case, it shall and may be lawful for the said William Frederick, either before or after his marriage with any woman or women whom he shall thereafter marry, by any deed or deeds, instrument, or instruments, in writing, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of, and attested by, two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, (but subject, nevertheless, and without prejudice to the said term of two hundred years, and the trusts thereof, and to the estate hereby limited to the said Francis Frederick for his life of and in the aforesaid manor and other hereditaments,) to limit and appoint unto, or to the use of, or in trust for, any woman or women whom the said William Frederick shall, after the

shall (unless he shall declare a contrary intention in writing) stand in the place of the child, or children, so advanced as aforesaid, in respect of the sum or sums of money, so by him given by way of advancement as aforesaid, and, to the extent of such advancement, shall be considered as a purchaser of the share or shares of such child or children."

decease of the said Grace Griffith, happen to marry, for her or their life or respective lives, and for her or their jointure or respective jointures, and in bar, or without being in bar, of her or their dower, any annual sum, or yearly rent-charge, or annual sums, or yearly rents-charge, not exceeding for any such woman the sum of £
of lawful money of Great Britain, free from taxes, and without any other deduction whatsoever, to be issuing out of, and charged and chargeable upon all or any part or parts of the said manor and other [*275] hereditaments, expressed to be hereby *appointed and released, and to limit and appoint to the woman or women respectively to or for the benefit of whom such annual sum or yearly rent-charge, or annual sums or yearly rents-charge, shall be appointed as aforesaid, usual powers and remedies for recovering and enforcing payment thereof when in arrear, by distress and entry upon and perception of the rents and profits of the hereditaments which shall be so charged with the said annual sum or yearly rent-charge, or annual sums or yearly rents-charge, and also to limit and appoint the hereditaments which shall be so charged as aforesaid (subject and without prejudice as aforesaid,) to any person or persons, his or their executors, administrators, and assigns, for any term or terms of years, with or without impeachment of waste, upon such trusts, for better securing the payment of such yearly rent-charge, as to the said William Frederick shall seem meet; but so that upon the death of the woman for the benefit of whom any such term shall be so limited, and the payment of the arrears of her rent-charge, and the expenses (if any) incurred by the non-payment thereof, the term to be limited for securing the said yearly rent-charge, or so much of the same term as shall not be disposed of under the trusts to be declared for securing the same yearly rent-charge, shall be made to cease and determine.

Provided always, and it is hereby further agreed and declared, that it shall and may be lawful to and for the said Francis Frederick and William *Frederick, [*276] from time to time during their joint lives, and after the decease of either of them, then to and for the

survivor of them, from time to time during his life, and after the decease of such survivor, then to and for the guardian or guardians, for the time being, of any child or children of the said William Frederick, who, by virtue of, or under the limitations hereinbefore contained, shall be entitled to the actual freehold or inheritance of the said hereditaments and premises, from time to time, during the minority of such child or children respectively, to demise or lease all or any part or parts of the said hereditaments and premises, with the appurtenances, to any person or persons, for any term or number of years, not exceeding twenty-one years in possession, and not in reversion, or by way of future interest; so that there be reserved and made payable on every such lease, during the continuance thereof, the best and most improved yearly rent or rents, to go along with, and be incident to, the immediate reversion of the premises so to be leased, that can or may be reasonably had or gotten for the same, without taking any fine, premium, or foregift, for the making thereof; and so that, in every such lease, there be contained a condition of re-entry on the non-payment of the rent or rents to be thereon, or thereby, respectively reserved, by the space of twenty-one days next after the same shall become due and payable; and so that the lessee or the respective lessees, to whom such lease or leases shall be made, seal and deliver a counter-part *or counterparts of such lease or leases; and [*277] so that none of the lessees, to whom any such lease or leases shall be made, be, by any clause or words therein contained, authorised to commit waste, or exempted from punishment for committing waste; anything herein contained to the contrary thereof notwithstanding.

Provided also, and it is hereby further agreed and declared between and by the said parties hereto, that the said several trustees, and each and every of them, their and each and every of their heirs, executors, administrators, and assigns, shall be charged and chargeable only for so much money as they or he shall respectively actually receive by virtue of, or under, the trusts aforesaid; and that any one or more of them shall not be answerable for the other or others of them, nor for the acts, re-

ceipts, neglects, or defaults of the other or others of them, but each of them for his own acts, receipts, neglects, and defaults only; nor shall they or any of them be answerable or accountable for any person or persons who is, are, or shall be, the receiver or receivers of the rents and profits of the said hereditaments and premises, or any of them, or any part thereof; or in whose hands the same, or any of the trust-moneys, shall or may be deposited or lodged for safe custody; nor for any misfortune, loss, or damage, which may happen in the execution of any of the aforesaid trusts, or in relation thereto, except the [*278] same shall happen by or through their *own wilful neglects or defaults respectively; and also that the said several trustees, and each and every of them, their and each and every of their heirs, executors, administrators, and assigns, shall and may, by and out of the moneys which shall come to their respective hands, by virtue of the trusts aforesaid, retain to, and reimburse themselves respectively, and also allow to their and his co-trustee and co-trustees, all loss, costs, damages, and expenses, which he or they, or any of them, shall or may respectively suffer, sustain, expend, disburse, or be put unto, or which shall or may be to him, them, or any of them, occasioned, for, or on account, or by reason or means, of the trusts hereby in them reposed, or the management and execution thereof, or otherwise howsoever relating thereto.

And the said Francis Frederick and William Frederick, for themselves, severally and respectively, and for their several and respective heirs, executors, and administrators, do hereby severally covenant, promise, and agree with and to the said Henry Howard and Henry Hunt, their heirs and assigns, in manner and form following; (that is to say,)

That (for and notwithstanding any act, deed, matter, or thing whatsoever made, done, committed, executed, or suffered, by him the said Francis Frederick, or any of his ancestors, or by the said William Frederick, to the [*279] contrary,) they *the said Francis Frederick and William Frederick now at the time of the sealing and delivery of these presents, have in themselves good

right, full power, and lawful and absolute authority, to limit and appoint, grant, bargain, sell, release, and convey the manor, messuages, lands, advowson, tenements, hereditaments, and premises hereby limited and appointed, granted and released, or intended so to be, and every of them, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, to the uses, and upon and for the trusts, intents, and purposes, and in manner and form aforesaid, according to the true intent and meaning of these presents :

And likewise, that the manor, messuages, advowson, lands, tenements, hereditaments, and premises, hereby limited, appointed, granted, and released, or intended so to be, and every of them, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, shall and lawfully may, from time to time, and at all times hereafter, remain, continue, and be, to the several uses, upon the several trusts, and for the several intents and purposes hereinbefore limited, created, expressed, and declared, of and concerning the same, and shall and may be peaceably and quietly had, held, and enjoyed, accordingly ; without the let, suit, trouble, denial, eviction, ejection, disturbance, molestation, hindrance, interruption, claim, or demand, whatsoever *of, from, or by the said Francis Frederick [*280] and William Frederick, or either of them, or their, or either of their heirs, or any person or persons claiming, or to claim by, from, through, under, or in trust for them, or any of them, or any of the ancestors of the said Francis Frederick ;

And that free and clear, and freely, clearly, and absolutely acquitted, exonerated, and discharged, or otherwise by them the said Francis Frederick and William Frederick, or one of them, their or one of their heirs, executors or administrators, well and sufficiently saved, defended, kept harmless, and indemnified, of, from, and against all estates, titles, troubles, charges, and incumbrances whatsoever, at any time or times heretofore or to be, at any time or times hereafter made, done, executed, committed, or suffered by the said Francis Frederick,

and William Frederick, or either of them, or any of the ancestors of the said Francis Frederick;

And moreover, that they the said Francis Frederick, and William Frederick, and their heirs, and all and every other person or persons, having, or lawfully claiming, or who shall or may at any time or times hereafter have, or lawfully claim, any estate, right, title, interest, inheritance, property, or demand whatsoever, either at law or in equity, of, in, to, or out of the manor, messuages, lands, advowson, tenements, hereditaments, and [*281] premises hereby limited and appointed, granted and released, or intended so to be, or of, in, to, or out of any of them, or any part or parcel thereof, by, from, under, or in trust for them, or any of them, or any of the ancestors of the said Francis Frederick, shall and will from time to time, and at all times hereafter, upon every reasonable repuest of the said Henry Howard and Henry Hunt, their heirs or assigns, but at the proper costs and charges in the law of the person or persons, for the time being, beneficially interested in the premises, make, do, acknowledge and execute, or cause and procure to be made, done, acknowledged and executed, all and every such further and other lawful and reasonable act and acts, thing and things, deed and deeds, conveyances, and assurances in the law whatsoever, for the further, better, more perfectly, and absolutely granting, releasing, and assuring the manor, messuages, lands, advowson, tenements, hereditaments, and premises hereby limited and appointed, granted and released, or intended so to be, and every of them, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, to the several uses, upon the several trusts, and for the several intents and purposes and under and subject to the several powers, provisoies, declarations, and agreements hereinbefore created, expresssed, declared, and contained of and concerning the same, or such of them as shall then remain to be performed, and be capable of taking effect; as by them the said [*282] Henry Howard and Henry Hunt, or *the survivor of them, his heirs or assigns, or any of them,

their or any of their counsel in the law, shall be reasonably advised, or devised, and required. In witness, &c.

The following Form of an Appointment, by reference to the uses of a subsisting settlement, with the addition of new uses, and a provision for making the new uses subject to the powers created by reference, was prepared by the Author's friend, Lewis Duval, Esq., and is published by his permission, and at the Author's request.

THIS Indenture, &c. 1822.

Between Henry Thompson, of, &c. Esq., and William John Thompson, of &c., aforesaid, Esq., (the eldest surviving son and heir-apparent of the said Henry Thompson,) of the first part; George Thompson, of &c., Esq., (the second surviving son of the said Henry Thompson,) of the second part; G. C. Wilson, of &c., spinster, (the only child of Charles Edmund Wilson, of &c. aforesaid, Esq.,) of the third part; and Edward Richards, of &c., Esq., and Henry John Jackson, of &c., Esq., Andrew B. Dixon and A. R. Dixon, both of &c., Esq., of the fourth part:

*Whereas by an indenture of lease and an indenture of appointment and release, bearing [*283] date respectively on or about the 1st and 2d days of June, 1821, the appointment and release being made, or expressed to be made, between the said Henry Thompson of the first part, the said W. J. Thompson of the second part, Henry Salter, Esq., and William Baxter, Esq., of the third part, and the Rev. George Roberts, Clerk, and the Rev. Henry Maxwell, Clerk, of the fourth part, All that the castle of C. in the county of D.; And all that the manor or lordship, or reputed manor or lordship, of C. in the county of D.; And all that the borough of C. and all royalties, franchises, and other hereditaments to the said castle, manor, and borough respectively belong-

ing, or situate within the said castle, manor, or borough, or within the parish of C. aforesaid, or the precincts or liberties thereof, whereof or wherein the said Henry Thompson and W. J. Thompson, or either of them, were or was at the time of the date and execution of a certain indenture of bargain and sale therein referred to, bearing date, &c. seised of any estate tail, at law, or in equity, And all, &c. [*here describe the parcels*] with their and every of their rights, royalties, members, and appurtenances, were appointed, conveyed, or otherwise assured (subject, as to the whole, or some part or parts of the same premises, to a yearly rent-charge of £600 devised or limited by the will of Henry Thompson Esq., deceased, the father of the said Henry Thompson (party hereto,) [*284] to Margaret *Thompson, now the widow and relict of the said Henry Thompson deceased, for her life, and also to a yearly rent-charge of £800 theretofore created by the said Henry Thompson (party hereto) for Frances Thompson his wife, during her life, and to a yearly rent-charge of £1000 created by the said Henry Thompson (party hereto,) on the marriage of Edward Thompson, his third surviving son, for the honourable J. Thompson, now the wife of the said Edward Thompson, for her life, and to the powers and remedies, and terms of years, limited or created for securing or enforcing the payment of the same yearly rent-charges respectively,) To the uses, upon the trusts, and for the ends, intents, and purposes, and under, and subject to the powers, provisoos, limitations, declarations, and agreements in the said indenture of appointment and release limited, expressed, and declared of and concerning the same, and in part hereinafter mentioned; (that is to say,) As to, for, and concerning the said manor or lordship, or reputed manor or lordship, of C. with its rights, royalties, members, and appurtenances in the said county of D., And all that, &c.

To the use of the said Henry Thompson (party hereto,) his heirs and assigns for ever; And, as, to, for, and concerning, all other the said manors or lordships, or reputed manors or lordships, boroughs, castles, advowsons, messuages, lands, tenements, hereditaments, and

premises not thereinbefore limited in use to the said Henry Thompson *and his heirs, and every part [*285] of the same, with their rights, royalties, members, and appurtenances, To the use of such person or persons, for such estate or estates, and for such interest or interests, by way of annuity, rent-charge, or otherwise, and in such parts, shares, and proportions, and upon such trusts, and for such intents and purposes, and charged and chargeable in such manner, and either absolutely or conditionally, and subject to such powers of revocation and new appointment, and other powers, provisoess, conditions, restrictions, limitations, declarations and agreements, as the said Henry Thompson (party hereto,) and W. J. Thompson, jointly should at any time or times, and from time to time, by any deed or deeds to be sealed and delivered by them in the presence of one, two, or more credible witness or witnesses, and attested by the same witness or witnesses, direct, limit, or appoint; and in default of such direction, limitation, or appointment, and in the mean time, and from time to time, subject to such uses, estates, trusts, charges, and interests, as should have been directed, limited, or appointed by the said Henry Thompson (party hereto,) and W. J. Thompson jointly as aforesaid, To the use, intent, and purpose that Frances Thompson, the wife of the said Henry Thompson (party hereto,) in case she should survive the said Henry Thompson (party hereto,) should, after the decease of the said Henry Thompson (party hereto,) and thenceforth during her natural life, receive, take, and enjoy, one annual *sum, or yearly rent-charge of [*286] £700, to be issuing and payable out of, and charged and chargeable upon, all and singular the said manors or lordships, or reputed manors or lordships, and other hereditaments, with their appurtenances, except the said hereditaments limited in fee-simple to the said Henry Thompson (party hereto,) and to be payable as in the said indenture of appointment and release is mentioned, with the usual powers and remedies of distress and entry, and retention of the possession and perception of the rents and profits of the same premises, for enforcing the payment of the same annual sum or yearly rent-

charge of £700, when in arrear; And subject thereto, and also subject and without prejudice to the term of 500 years thereafter limited, and the trusts thereof, To the use of the said Henry Thompson (party hereto,) and his assigns for his life, without impeachment of waste; with remainder to the use of the said H. Salter and W. Baxter, and their heirs during the natural life of the said Henry Thompson (party hereto,) Upon Trust to support the contingent remainders; with remainder to the use of the said George Roberts and H. Maxwell, their executors, administrators, and assigns, for the term of 500 years, without impeachment of waste, Upon the Trusts, and for the ends, intents, and purposes, therein-after declared concerning the same; with remainder to the use of the said William John Thompson and his assigns for his life, without impeachment of waste; with [*287] remainder to the use of *the said H. Salter and W. Baxter and their heirs during the life of the said W. J. Thompson, Upon Trust to support the contingent remainders; with remainder to the use of the first and every other son of the said W. J. Thompson severally, and successively according to their respective seniorities in tail male; with remainder to the use of the said George Thompson and his assigns for his life, without impeachment of waste; with remainder to the use of the said Henry Salter and W. Baxter, and their heirs during the life of the said George Thompson, Upon Trust to support the contingent remainders; with remainder to the use of the first and every other son of the said George Thompson severally and successively, according to their respective seniorities, in tail male; with remainder to the use of the said Edward Thompson and his assigns during his life, without impeachment of waste; with several remainders over; and with the ultimate limitation to the said Henry Thompson (party hereto,) in fee-simple: And in the said indenture of appointment and release was contained (among other provisoes, agreements, and declarations) a proviso, agreement, and declaration, that it should be lawful for the said W. J. Thompson, George Thompson, and Edward Thompson, respectively, when by virtue of the limita-

tions thereinbefore contained, they respectively should be in the actual possession, or entitled to the receipt of the rents and profits of, the said manors or lordships, or reputed manors or lordships, and other hereditaments, or *any part thereof, by any deed or deeds, instrument or instruments in writing, with or without power of revocation, to be executed and attested as therein mentioned, or by their respective last wills and testaments in writing, or any codicil or codicils thereto, to be signed, and published, and attested as therein mentioned, to limit or appoint to, or to the use of, or in trust for, any woman or women, whom they respectively, and each of them, from time to time should marry, for the life or lives of such woman or women, for her or their jointure or jointures, and in bar, or without being in bar, of her or their dower, or thirds at common law, or by custom, any annual sum or sums, yearly rent-charge, or rent-charges, not exceeding, in the whole, the clear yearly sum of £1500, for any one wife, and to be issuing out of, and charged and chargeable upon, all or any part or parts of the said manors or lordships, or reputed manors or lordships, and other hereditaments, and with such powers and remedies by distress, and entry upon, and retention of the possession and perception of the rents and profits of, the same hereditaments, and such term or terms of years therein for better securing the due payment thereof respectively, as the person or persons making such appointment or appointments should think fit: and such appointment or appointments to take effect immediately, or at any time after the determination of the estate of the person or persons respectively making such limitations or appointments, and such limitations or appointments to *be made either before or after such intermarriage or intermarriages, as to the person or persons respectively, who should make such limitations or appointments, should seem meet; And in the said indenture of appointment and release was also contained a proviso, agreement, and declaration, that it should be lawful for the said Henry Thompson (party hereto), by any deed or deeds, instrument or instruments, in writing,

with or without power of revocation, to be executed and attested as therein mentioned, or by his last will and testament in writing, or any codicil or codicils thereto, to be signed and published and attested as therein mentioned, to limit or appoint to, or to the use of, or in trust for, any woman or women with whom the said George Thompson might from time to time marry, or to his surviving wife, for the life or lives of such woman or women, for her or their jointure or jointures, and in bar, or without being in bar, of her or their dower, or thirds at common law, or by custom, any annual sum or sums, yearly rent-charge or rent-charges, not exceeding, in the whole, the clear yearly sum of £800, to be issuing out of, and charged and chargeable upon, all, or any part or parts of, the said manors or lordships, or reputed manors or lordships, and other hereditaments, with their rights, royalties, members, and appurtenances, with such powers and remedies by distress and entry upon, and retention of the possession and perception of the rents and profits of, the same hereditaments, and such term or terms of [*290] years *therein, for better securing the due payment thereof respectively, as the said H. Thompson (party hereto) should think fit, and such appointment or appointments to take effect from, and immediately or at any time after, the death of the said George Thompson, and whether he should or should not become tenant for life in possession; but the said annual sum of £800 a year, or so much thereof as might be appointed, should be, and should be deemed, a part satisfaction of the annual sum which might be appointed by the said George Thompson under his power thereinbefore contained; And such limitation or appointment to be made either before or after such intermarriage or intermarriages, and either before or after the person of the woman, who was to be the jointress, should be ascertained, as to the said Henry Thompson (party hereto) should seem meet; And in the said indenture of appointment and release, are contained certain powers of leasing, and of sale and exchange, with usual provisions for investing the moneys to arise from sale, or to be received for equality of exchange, in the purchase of other estates, to

be settled to the same uses, and for investing the same moneys, in the mean time, upon government or real securities. And whereas, a marriage hath been agreed upon, and is intended to be shortly had and solemnized, between the said George Thompson and the said G. C. Wilson; And whereas, upon the treaty for the said intended marriage, it was agreed (among other things) that the said Henry Thompson *(party hereto) [*291] and W. J. Thompson should, in exercise of the power of appointment limited to them jointly as hereinbefore is mentioned, limit and appoint to the said G. C. Wilson, and her assigns, during her life, by way of jointure, and in bar of dower, in case the said intended marriage should take effect, and she should survive the said George Thompson, an annual sum or yearly rent-charge of £800; and also limit and appoint to the said G. C. Wilson, and her assigns, during her life, in case the said intended marriage should take effect, and she should survive the said George Thompson, a further annual sum or yearly rent-charge of £700, to take effect in the event hereinafter in that behalf specified, and the same annual sums, or yearly rent-charges, respectively to be payable at the times and in the manner hereinafter mentioned and appointed for the payment of the same respectively, and with such powers and remedies and term of years, for enforcing or providing for the payment of the same respectively, as are hereinafter mentioned and contained.

Now this indenture witnesseth, that for effectuating the said agreement, and in consideration of the said intended marriage, and in pursuance and execution of the power or authority to the said Henry Thompson (party hereto) and W. J. Thompson limited or reserved in or by the said in part recited indenture of appointment and release as hereinbefore is mentioned, and of every, or any other power or authority in any wise *enabling [*292] them in this behalf, they the said Henry Thompson (party hereto), and W. J. Thompson (with the privity and approbation of the said George Thompson and G. C. Wilson, testified by their respectively being parties to, and sealing and delivering these presents),

do, by this present deed, by them, the said Henry Thompson (party hereto), and W. J. Thompson, sealed and delivered in the presence of, and attested by, the two credible persons whose names are intended to be hereupon indorsed, as witnesses to the sealing and delivery of these presents by them, the said Henry Thompson (party hereto), and W. J. Thompson, direct, limit, and appoint, That from and immediately after the solemnization of the said intended marriage between the said George Thompson and G. C. Wilson, All and singular the said manors or lordships, or reputed manors or lordships, boroughs, castles, advowsons, messuages, lands, tenements, hereditaments, and premises, by the said in part recited indenture of appointment and release limited, To the uses and in manner hereinbefore mentioned, (except the said hereditaments limited to the use of the said Henry Thompson, party hereto, in fee-simple), shall (subject and without prejudice to the said several yearly rent-charges of £600, £800, and £1000 respectively, and the powers, and remedies, and terms of years, for securing the payment of the same respectively), go, remain, and be to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to, the powers, [*293] *provisoies, agreements, and declarations, herein-after expressed and declared or referred to, of or concerning the same; (that is to say,) To the use, intent, and purpose, that the said G. C. Wilson and her assigns, shall and may, in case she shall survive the said George Thompson, have, receive, and take, during the term of her natural life, for her jointure, and in lieu, bar, and satisfaction, of the dower or thirds, and free bench at common law, or by custom or otherwise, which she might otherwise have, claim, or demand, in, to, or out of, all or any lands or hereditaments in England or elsewhere, of which he the said George Thompson now is, or shall, during the said intended coverture, be seised for any estate of inheritance, or for any other estate to which dower or free bench is incident, one annual sum, or yearly rent-charge of £800 of lawful money of Great Britain, to be chargeable upon, and yearly issuing and payable out of, the said manors or lordships, or reputed manors or

lordships, hereditaments and premises hereby limited and appointed, and to be paid quarterly, at or in the common dining hall of Lincoln's Inn, in the county of Middlesex, by equal quarterly payments on the four most usual days of payment in the year; that is to say, the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December in every year, without any deduction or abatement whatsoever, on account or in respect of any taxes, charges, impositions, or assessments, already taxed, charged, assessed, or imposed, or hereafter to *be taxed, charged, assessed, or imposed, on [*294] the said manors or lordships, or reputed manors or lordships, hereditaments and premises, or on the said annual sum or yearly rent-charge of £800, or the said G. C. Wilson or her assigns, in respect thereof, by authority of parliament or otherwise howsoever; and the first quarterly payment thereof to be made on such of the said days of payment, as shall happen next after the decease of the said George Thompson: And to and for this further use, intent, and purpose, that in case, when, and as often, as the said annual sum, or yearly rent-charge of £800 hereinbefore limited, or any part thereof, shall, at any time or times, be unpaid by the space of twenty-one days next after any of the days hereby appointed for the payment thereof as aforesaid, then, and so often, it shall be lawful to and for the said G. C. Wilson and her assigns, during the term of her natural life, to enter into, and distrain upon, the said manors, &c. hereby limited and appointed, or any part thereof, and to dispose of the distress or distresses, then and there found according to law, To the intent, that thereby, or otherwise, the said annual sum or yearly rent-charge of £800 hereby limited, and every part thereof, so in arrear and unpaid, and all costs, charges, and expenses, occasioned by reason of the non-payment thereof, shall be fully paid and satisfied; And to and for this further use, intent, and purpose, that in case the said annual sum, or yearly rent-charge of £800 hereby limited, or any part thereof, shall, at any time or *times, be unpaid by the space of forty [*295] days next after any of the said days appointed for the payment thereof, Then and so often (although

there shall not have been any legal demand made thereof,) it shall be lawful for the said G. C. Wilson and her assigns, during the term of her natural life, to enter into and upon, and hold the said manors or lordships, or reputed manors or lordships, hereditaments and premises hereby limited and appointed, or any part thereof, and to receive and take the rents, issues, and profits thereof, to her and their own use, until she or they shall thereby, therewith, or otherwise, be fully paid and satisfied the said annual sum, or yearly rent-charge of £800 hereby limited, and the arrears thereof, due at the time of such entry, or afterwards to become due during her or their being in possession of the same premises; Together with all costs, charges, and expenses, which she or they shall sustain by reason of the non-payment thereof; and such possession, when taken, to be without impeachment of waste.

And to and for this further use, intent, and purpose, that if the said Henry Thompson (party hereto) and W. J. Thompson shall both die during the joint lives of the said George Thompson and G. C. Wilson, and there shall also happen, during the joint lives of the said G. Thompson and G. C. Wilson, a default or failure of issue male of the body of the said W. J. Thompson, and the said G. C. Wilson shall survive the said George *Thompson [^{*296}] son, then and in such case, she the said G. C. Wilson and her assigns shall and may, from and immediately after the decease of the said George Thompson, receive and take, during the term of her natural life (in addition to the said annual sum or yearly rent-charge of £800 hereinbefore limited,) one annual sum or yearly rent-charge of £700 of lawful money of Great Britain, to be chargeable upon, and yearly issuing, and payable out of, all and singular the said manors or lordships, &c. hereinbefore limited and appointed, or intended so to be, and to be paid quarterly on or at the days or times, and without deduction for present or future taxes, charges, impositions, or assessments, in such manner as is, hereinbefore mentioned and appointed for the payment of the said annual sum or yearly rent-charge of £800 hereinbefore limited; And the first quarterly pay-

ment of the said annual sum or yearly rent-charge of £700, to be made on such of the said quarterly days of payment hereinbefore appointed for the payment of the said annual sum or yearly rent-charge of £800, as shall happen next after the decease of the said G. Thompson; And to and for this further use, intent, and purpose, that in case the said annual sum or yearly rent-charge of £700, or any part thereof, shall be unpaid by the space of twenty-one days next after any of the days appointed for the payment thereof as aforesaid, then, and so often as the same shall happen, she the said G. C. Wilson and her assigns shall and may, for *the recovery thereof, and of all costs and damages [*297] occasioned by the non-payment thereof, have and enjoy such and the like power of distraining upon all, or any of, the aforesaid manors, &c., and other hereditaments hereby charged with the payment of the same; And also in case the said annual sum or yearly rent-charge of £700 or any part thereof, shall be in arrear or unpaid by the space of forty days next after any of the days appointed for payment of the same, the said G. C. Wilson and her assigns shall and may, for compelling payment and obtaining satisfaction for the same, together with such costs and damages as aforesaid, have and enjoy such and the like powers of entering upon, and retaining the possession, and receiving and taking the rents, issues, and profits of, all or any of the said manors, &c., charged with the payment thereof, as hereinbefore is or are limited to and for her the said G. C. Wilson and her assigns for enabling her and them to recover payment and obtain satisfaction of and for the said annual sum or yearly rent-charge of £800 hereinbefore limited; and subject and charged as hereinbefore is mentioned) To the use of the said (the parties of the third part) their executors, administrators, and assigns, for and during the term of two hundred years, to be computed from the death of the said G. Thompson, and thenceforth next ensuing and fully to be complete and ended, without impeachment of, or for, any manner of waste, Upon the trust, and for the intents and purposes, and with, under, and

[*298] subject *to the powers, provisoess, agreements, and declarations hereinafter expressed and contained concerning the same ; and from and after the expiration or sooner determination of the said term of two hundred years, and in the mean time subject thereto, and to the trusts thereof, To the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoess, agreements, and declarations, to, upon, for, with, under, and subject to which, the same premises, were and stood limited and settled, by virtue of or under the hereinbefore in part recited indenture of appointment and release immediately before the sealing and delivery of these presents, including the aforesaid power of joint appointment by the same indenture limited to the said Henry Thompson (party hereto) and W. J. Thompson, and intended to be hereby exercised as aforesaid : save and except that the powers of jointuring by the said indenture of appointment and release limited to the said George Thompson and Henry Thompson (party hereto) respectively, as hereinbefore is mentioned, and hereby limited by reference as aforesaid, shall not be exerciseable in favour of the said G. C. Wilson ;

And it is hereby agreed and declared between and by the parties to these presents, that the said manors, &c., and other hereditaments, hereinbefore appointed, or expressed and intended so to be, are hereby limited to the said their executors, administrators,

[*299] and assigns, for *the said term of two hundred years, upon trust for the further and better securing the payment of the said several sums, or yearly rent-charges of £800 and £700 hereinbefore respectively limited as aforesaid, at the days and times and in the manner hereinbefore mentioned and appointed for payment thereof respectively, without any deduction or abatement as aforesaid; for which end it is hereby agreed and declared between and by the said parties to these presents, that the said their executors, administrators, and assigns, shall and do permit and suffer the person and persons to whom the immediate reversion or remainder of the said manors or lordships, &c. comprised in the said term of two hundred years, expect-

ant upon the determination thereof, shall for the time being belong, according to the limitations aforesaid, to receive and take the rents, issues, and profits of the same premises, until default shall happen to be made of or in payment of the said annual sums of £800 and £700 hereinbefore respectively limited, or one of them, or some part thereof respectively, at the times and in the manner hereinbefore appointed for payment of the same respectively; and that in case the same annual sums, or yearly rent-charges of £800 and £700, or either of them, or any part thereof respectively, shall happen to be behind or unpaid by the space of forty days next after any one of the said days, whereon the same respectively are hereinbefore directed to be paid, then and in such case, and so often as the same shall happen, the *said

[*300] or the survivors or survivor

of them, or the executors, administrators, or assigns of such survivor, do and shall from time to time by and out of the rents, issues, and profits of the said manors, &c., comprised in the said term of two hundred years, or by demising, leasing, or mortgaging the same premises, or any part thereof, for all or any part of the said term, or by bringing actions against the tenants or occupiers of the same premises for recovery of the rents and profits, or by such other reasonable ways or means, as to the said or the survivors or survivor of them, or the executors, administrators, or assigns of such survivor, shall seem meet, levy, raise, and pay the said annual sums or yearly rent-charges of £800 and £700 hereinbefore respectively limited, or such of them as shall be so in arrear, and all arrears thereof respectively which shall be then due and unpaid, or which shall afterwards, during their continuance in possession, accrue of the same, and all costs, damages, and expenses, which the said G. C. Wilson, her executors, administrators, or assigns, or the said , or any of them, their, or any of their executors, administrators, or assigns, or any of them, shall be put unto or sustain by reason of the non-payment thereof, or the recovering or obtaining thereof, or otherwise relating thereto; and do and shall pay the surplus, if any, of the moneys to be raised by the ways

and means aforesaid, to the person or persons next in re-
[*301] mainder or reversion for the time being imme-
diately *expectant upon the determination of the
said term of two hundred years, according to the limita-
tions aforesaid.

Provided always, and it is hereby agreed and declared, between and by the parties to these presents, that immediately after all the trusts hereinbefore declared of and concerning the said term of two hundred years shall, in all respects, be fully performed and satisfied, or shall become unnecessary, or incapable of taking effect, and the said , and every of them, their and every of their executors, administrators, and assigns, shall be fully reimbursed and satisfied all costs, charges, and expenses, if any, to be occasioned by, or relating to, the trusts hereby reposed in them as aforesaid, the said term of two hundred years shall, subject and without prejudice to any disposition which shall have been made of the premises comprised therein, or any of them, or any part thereof, for the purposes aforesaid, absolutely cease and determine.

Provided always, and it is hereby agreed and declared between and by the parties to these presents, that the uses, trusts, intents, purposes, powers, provisoies, agreements and declarations, hereinbefore respectively limited and declared, or referred to, of, or concerning the said manors or lordships, or reputed manors or lordships, hereditaments, and premises, hereinbefore limited and ap-
[*302] pointed, or expressed and intended so to be, *shall respectively take effect, in such manner in all respects, as if the uses, trusts, intents, purposes, powers, provisoies, agreements and declarations, hereinbefore limited and declared expressly, and not by reference to the uses, trusts, intents, purposes, powers, provisoies, agreements and declarations, limited and declared by the said indenture of appointment and release, had been originally inserted and contained in the same indenture; to the intent, and so that, the said uses, trusts, intents, purposes, powers, provisoies, agreements, and declarations, hereinbefore limited and declared expressly, and not by reference as aforesaid, shall or may, by virtue of or under

the exercise of any of the powers hereby respectively limited, or created, by reference to the powers of leasing and of sale and exchange respectively limited or created by the said indenture of appointment and release, be over-reached to the same extent, and in the same manner, as if the said powers of leasing and of sale and exchange respectively, had been expressly limited by this present indenture, and been made to over-reach all and singular the other uses, trusts, intents, purposes, powers, provisoes, agreements, and declarations, hereinbefore limited and declared, whether expressly or by reference as aforesaid ; and to the intent, and so that, the trusts and provisoes in these presents declared and contained, by reference to the trusts and provisoes in the said indenture of appointment and release declared and contained, as to the application of the moneys to arise from any *sale or sales, or to be received for equality [*303] of exchange, under the said powers of sale and exchange, shall or may take effect to the same extent, and in the same manner, as if the same had been expressly declared and contained in this present indenture, and had expressly been made applicable to all the other uses, trusts, intents, purposes, powers, provisoes, agreements and declarations, hereinbefore limited and declared, whether expressly or by reference as aforesaid.

Provided always, and it is hereby declared, that the said trustees hereby nominated and appointed, and every of them, and the executors, administrators, and assigns of them, and every of them, shall be charged and chargeable respectively only for such moneys as they shall respectively actually receive by virtue of the trusts hereby in them reposed, notwithstanding his or their, or any of their giving or signing, or joining in giving or signing, any receipt or receipts for the sake of conformity ; and any one or more of them shall not be answerable or accountable for the other or others of them, or for the acts, receipts, neglects, or defaults of the other or others of them, but every of them only for his and their own acts, receipts, neglects, or defaults respectively ; and that any one or more of them shall not be answerable or accountable for any banker or other person, with whom, or in

whose hands, any part of the said trust moneys shall or may be deposited or lodged for safe custody, or otherwise, in the execution *of the trusts hereinbefore [*304] mentioned; and that they or any of them shall not be answerable or accountable for any misfortune, loss, or damage, which may happen in the execution of the aforesaid trusts, or in relation thereto, except the same shall happen by or through their own wilful defaults respectively; and also that it shall and may be lawful to and for them, the said trustees in these presents named, and every of them, their, and every of their executors, administrators, and assigns, by and out of the moneys, which shall come to their respective hands by virtue of the trusts aforesaid, to retain to, and reimburse himself and themselves respectively, and also to allow to his and their co-trustee or co-trustees, all costs, charges, damages, and expenses, which they or any of them, shall or may suffer, sustain, or be put unto, in, or about the execution of the aforesaid trusts, or in relation thereto.

And each of them the said Henry Thompson (party hereto) and W. J. Thompson, so far only as relates to his own acts and deeds, and the acts and deeds of persons claiming, or to claim under or in trust for him, doth for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said their executors, and administrators, by these presents, in manner following; (that is to say,) that for and notwithstanding any act, deed, matter, or thing by them the said Henry Thompson (party hereto) and William John Thompson, or either of *them, made, done, committed or executed, or knowingly or willingly suffered to the contrary, the power or authority herebefore exercised by the said Henry Thompson (party hereto) and William J. Thompson, was well and effectually created by the hereinbefore in part recited indenture of appointment and release, and the same, at the time of the sealing and delivery of these presents, is in full force and in no wise weakened, extinguished, suspended, or become void: and that (for and notwithstanding any such act, deed, matter, or thing whatsoever as aforesaid)

they the said Henry Thompson (party hereto) and W. J. Thompson now have in themselves good right, full power, and lawful and absolute authority, to direct, limit, and appoint the said manors or lordships, &c., and other hereditaments hereinbefore limited and appointed, or expressed and intended so to be, with the rights, members, and appurtenances, to the uses and in manner aforesaid, according to the true intent and meaning of these presents: and that the same manors, &c., and other hereditaments, with their rights, members, and appurtenances, shall and may, from time to time and at all times hereafter, go and remain to the uses hereinbefore limited and declared, and be peaceably and quietly entered into and upon, and be held, occupied, possessed, and enjoyed, and the rents, issues, and profits thereof, and of every part thereof, had, received, and taken accordingly, without the lawful let, suit, trouble, denial, eviction, interruption, claim, or demand whatsoever, [*306] *of or by them the said H. Thompson (party hereto,) and W. J. Thompson, or either of them, or either of their heirs, or of or by any other person or persons lawfully or equitably claiming, or to claim, by, from, or under, or in trust for him, them, or any of them, other than persons claiming under, or in respect of, any of the leases, or agreements for leases, under which the same hereditaments are now held by the tenants or occupiers thereof, or under or in respect of any of the charges hereinbefore mentioned, or referred to; and that free and clear, and freely and clearly, and absolutely, acquitted, exonerated, released, and for ever discharged, or otherwise, by the said H. Thompson (party hereto) and W. J. Thompson, or one of them, or their, or one of their, heirs, executors, or administrators well and sufficiently saved, defended, kept harmless, and indemnified, of, from, and against all, and all manner of former estates, titles, troubles, charges, debts, and incumbrances whatsoever, either already had, made, executed, occasioned, or suffered, or hereafter to be had, made, executed, occasioned, or suffered, by the said H. Thompson (party hereto) and W. J. Thompson, or either of them, or either of their heirs, or by any person or persons lawfully or equitably claiming, or to claim by, from, or under,

or in trust for them, or any of them (other than the said subsisting leases or agreements for leases and the said charges hereinbefore referred to): And further, that they the said H. Thompson (party hereto) and W. J. [*307] *Thompson, and each of them, and their respective heirs, and all and every other persons or person having, or claiming, or who shall or may have or claim, any estate, right, title, interest, inheritance, use, trust, property, claim, or demand whatsoever, either at law or in equity, of, in, to, or out of the said manors, &c. and other hereditaments hereinbefore limited and appointed or expressed and intended so to be, or any of them, or any part thereof, by, from, or under, or in trust for them, the said H. Thompson (party hereto) and W. J. Thompson, or either of them, (other than persons claiming under, or in respect of, any of the said leases or agreements for leases and charges hereinbefore excepted) shall and will, from time to time and at all times hereafter, upon every reasonable request to be made for that purpose, by and at the proper costs and charges in the law of the said . . . or the survivors or survivor of them, or the executors or administrators of such survivor, or of any person or persons beneficially entitled under any of the limitations hereinbefore contained, make, do, acknowledge, levy, suffer, and execute, or cause and procure to be made, done, acknowledged, levied, suffered, and executed, all and every such further and other lawful and reasonable acts, deeds, things, devices, conveyances, and assurances in the law whatsoever, for the further, better, more perfectly, and absolutely, limiting and assuring of the said manors, &c. and other hereditaments, hereinbefore limited and appointed, [*308] or expressed and intended so to be, *and every part thereof, with their appurtenances, to the uses hereinbefore limited and declared or referred to, of or concerning the same; as by the said . . . or the survivors or survivor of them, or the executors, or administrators, of such survivor, or any person or persons beneficially entitled under any of the limitations hereinbefore contained, or their, or any of their, counsel in the law, shall be reasonably devised or advised and required. In witness, &c.

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